Law Quadrangle Notes

THE UNIVERSITY OF MICHIGAN LAW SCHOOL VOLUME 28, NUMBER 3, SPRING 1984

Sandalow on The Moral Responsibility of Law Schools

Philip Soper: What is law?
The school prayer debate
A look at public interest careers

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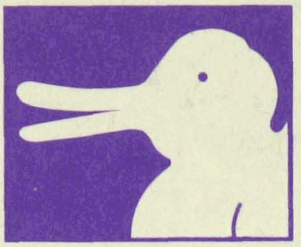
ARTICLES

DEPARTMENTS



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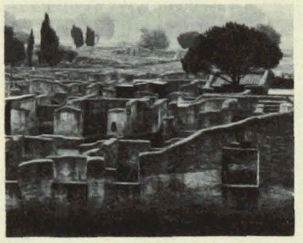

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Representing the children

Training makes the difference

Complex social and legal problems abound in the approximately 14 percent of child abuse and neglect cases that reach the juvenile courts. Because the child's best interests may not be those of the parents, 46 states and jurisdictions now require the appointment of a *guardian ad litem* (GAL) or counsel for the child—usually a lawyer without special training—to function as the child's independent representative during the court proceedings.

Despite the consensus that such representation is desirable and wise, much of it has been offered in a haphazard manner. Throughout the country, there is little consistency of approach among lawyers and little or no agreement as to what constitutes good and effective representation of children. Nor has the comparative effectiveness of specially trained attorneys or non-attorney volunteers been studied in any empirical fashion.

When the federal Department of Health and Human Services requested proposals dealing with the improvement of GAL services, Donald Duquette, the clinical professor of law who heads the Law School's Child Advocacy Clinic, seized the opportunity to develop some solid data on the subject. While providing GALs for child protection cases in Genesee County, Michigan, Duquette and his co-investigators, Kathleen Coulborn Faller, a professor of social work at the U-M, and Sarah H. Ramsey, a Law School LL.M. now teaching at Syracuse University, took a good, hard, empirical look at the effects of a well-defined, aggressive approach to the independent representation of children. Their research examined the feasibility of using specially trained attorneys, lay volunteers, and law students as GALs in lieu of court-appointed attorneys, most of whom develop expertise in child representation through hit-or-miss, case-by-case experience.

"My feeling," comments Duquette, a social worker before he became a lawyer, "was that lawyers brought only a knowledge of procedure to these cases. Some were warm and caring—but they didn't have a corner on that market. I thought we could get similar results with trained and supervised lay persons."

Duquette's hypothesis proved correct: trained volunteers and law students made excellent GALs. In fact, along with the attorneys who completed the special training sessions, they outperformed the control group consisting of untrained, court-appointed attorneys. Cases handled by the volunteers, law students, and attorneys who constituted the three experimental groups were resolved more quickly and with fewer court hearings, and resulted in fewer wards of the court.

The duties Duquette would delegate to GALs encompass both the child's legal and nonlegal interests. "Our definition of the role," he says, "rejects a passive, purely procedurally oriented approach. It includes traditional courtroom advocacy but also emphasizes out-of-court advocacy in informal meetings, in the agencies, and over the phone to other service deliverers."

Because the three experimental groups were trained, during a four-day intensive program, to approach their advocacy this way, the study tested the importance of an ambitious, active definition of the GAL's role. In some sense it tested the importance of merely

defining the role at all. "No one had ever given them a standard by which to measure their own performance," Duquette says. "No one had said what constituted a good job."

In their report to the funding agency, Duquette and his co-investigators point out that the decisions shaping a GAL's ultimate course of action are basically nonlegal in character. Nothing in their legal training has equipped child advocates to assess parental conduct or to evaluate a particular intervention strategy's soundness. In determining an abused or neglected child's best interests, GALs must synthesize the results of the protective services investigation with their own assessment of the facts and the available treatment resources. They must take into account the child's psychological, developmental, and physical needs and the child's articulated wishes. Then they must plead their positions vigorously, both in the courtroom and the social service system.

During the study's one and one-half years, all cases were heard by the same judge, the Honorable Thomas L. Gadola, J.D. '57, whom Duquette credits for his extraordinary cooperation with the project. Children whose cases fell to a member of the experimental groups had consistent representation; the same GAL represented them from the preliminary hearing until the case left the court system. In contrast, control-group attorneys did not serve for the case's duration. Following the usual court procedure, one attorney was appointed for the preliminary hearing only; another served at subsequent hearings. It is Duquette's feeling that consistency of representation played a part in the improved results achieved by the experimental-group GALs.

Duquette had little trouble finding suitable lay volunteers. Through the Genesee County Consortium on Child Abuse and Neglect and the Volunteer Action Center of Flint, the project located 14 high-caliber volunteers, people who had experience with children or with the court system and whose attitude toward child abuse and neglect was family-oriented and rehabilitative. Among those selected: a newspaper reporter, a former juvenile court caseworker, a retired automobile worker, a U-M Flint college student, and the executive director of a social service agency.

In analyzing their data, Duquette and his colleagues found that the experimental groups were more involved in case investigation than the control group and were more likely to assume follow-up responsibility for cases subsequent to each hearing. To control-group members, meetings with the child were a time to relate the recommendations they would make to the court; the experimental groups were more likely to use their contacts to assess the child's environment. They were also more active mediators, and were, in general, more critical of the workings of the court system.

The results were that the experimental groups' cases spent a significantly shorter time period in the court system before reaching first major disposition (the experimental mean was 37.9 days, the control mean, 60.6 days). "The whole process was moved up," says Duquette. "Time is so important for kids; they're not like money in escrow which earns interest during the litigation. Any way you can save time is a real advantage for them."

Another indication of the accelerated court process was that no contest pleas, occurring at about the same rate in the two groups, were entered earlier in the court process in experimental cases. Fewer experimental cases went past the preliminary hearing to enter the formal court process; of those that did, significantly more were settled before a formal dispositional hearing date.

Duquette's study has important policy implications. Of greatest consequence is its suggestion that training in an aggressive model of child advocacy not only results in improved court efficiency but in improved case outcome. Children in control-group cases were more likely to be made wards of the court before case dismissal; experimental cases, when dismissed, tended to be dismissed without the children first being made wards of the court.

That training itself—in the techniques of advocacy and social work, in psychology and child development—is more important than *who* is trained suggests that lay volunteers, carefully selected and trained and under lawyer supervision, may be the cost-effective choice as GALs. Among Duquette's ideal volunteers: law students, social workers, psychologists, or graduate students in those disciplines. But nearly every community, he stresses, can find excellent—and willing—volunteers in mature, experienced adults who care deeply about children and their families.

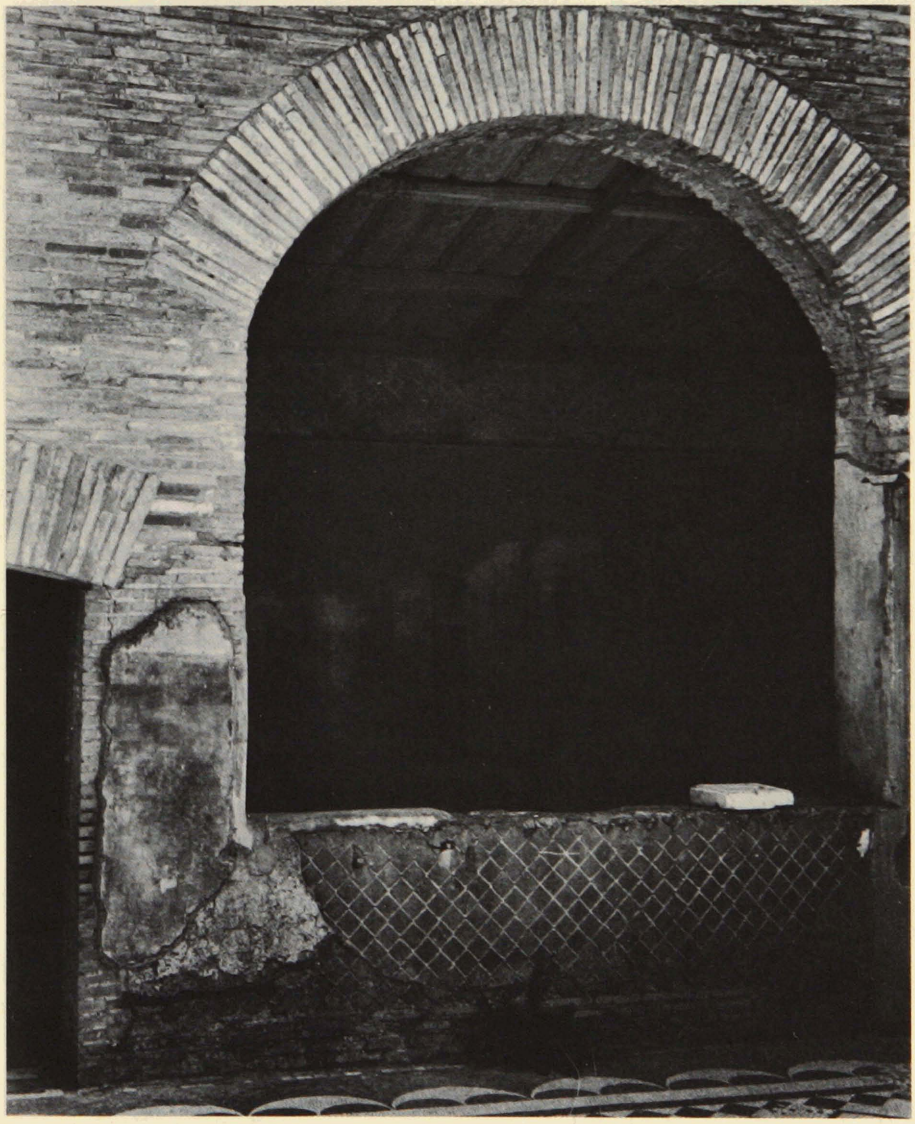
Lawyer supervision, however, remains important. "Even if the statute didn't require it, there should be a supervising attorney," Duquette comments. "It is a legal environment, and our supervising attorney received many requests for information about what would happen at this hearing or that court session. But once the volunteers were comfortable with the legal environment, they did well. In our study, they appeared without the supervising attorney 40 percent of the time." ◘

When in (ancient) Rome . . .

Even the rich rented

NOTICE: Spacious, well-located Roman luxury apartment for rent July 1 to June 30. Solidly constructed, light-filled living spaces; tile floors, wooden-beamed ceilings, painted-plaster walls. No security deposit. Rent payable at end of lease. Subletting, children, pets, okay.

It sounds like a dream rental, culled, perhaps, from a recent issue of the *New York Review of Books*. But this hypothetical apartment was for rent a long, long time ago, at a time when landlords welcomed families with slaves but not those who arrived with haystacks in tow. Fire was a constant danger in Imperial Rome's apartment complexes; understandably uneasy about seeing their profits go up in smoke, Roman landlords often included "incendiary" clauses in their leases.



Turn-key condition: Frescoes and mosaic-tile floors simplified decorating ancient Roman apartments.

The Roman private law concerning leasehold was designed both to attract upper-class renters and to protect the real estate investments of wealthy citizens who otherwise might limit themselves to agricultural holdings. Such are the motives that Bruce Frier, a University of Michigan classical studies professor who teaches Roman law at the Law School, imputes to it in *Landlords and Tenants in Imperial Rome*. Published in 1980 by Princeton University Press, the book won the American Philological Association's 1983 Goodwin Award of Merit.

The view that Roman leasehold law was purposive runs contrary to the grain of most previous scholarship in the area, said Frier, who has just received a Guggenheim Fellowship to study Roman commercial law. "Roman law," he noted, "comes down to us in the writings of the jurists—the *Digest* of Justinian is the great intermediary—and the jurists were developing law at a rather high level of abstraction. Legal historians have treated Roman law that way as well—as a logical abstraction removed from social reality. It's still fairly novel to suggest that Roman law, in its particular rules and *en masse*, had a social purpose."

There is no doubt, however, that it would have been sensible for the jurists to encourage the speculative development of upper-class rental apartments in ancient Rome, where primitive forms of transportation set a firm limit to the city's extent; where

land was in consequence so scarce as to force multi-story construction; and where "vertical" zoning segregated the classes by floor rather than by neighborhood ("penthouses" were strictly for the poor; the upper classes occupied the second floor, the *piano nobile*).

The picture Frier has pieced together, using legal as well as archaeological and literary sources, is of a body of law that concerned itself almost exclusively with upper-class rentals; it was law for those who could afford to litigate—approximately five to seven percent of the urban population. Although Rome's leasehold law was landlord-friendly, it preserved a balance between tenants' and landlords' rights, a reflection, perhaps, of the near social equality of the two contracting parties.

The housing complexes that were developed by and for the wealthy were luxurious by prevailing standards. Few had running water, kitchens, or toilet facilities: but permanent amenities such as mosaic floors and wall frescoes simplified apartment dwellers' decorating tasks. Light-filled and generous in size at 150 to 300 square meters—the size of a modern suburban house—the apartments would have provided ample living space for well-to-do families and the slaves who served them.

Damages done by slaves were a constant worry for landlords, but their upper-crust masters could be assumed to be the model tenants landlords love to have. Senators' children eager to fly the family-owned nest, wealthy freedmen, and youthful aristocrats all would have been likely tenants. Cicero's son was a renter—his father, incidentally, had substantial urban real estate investments—as was the poet Martial, the senators Seneca and Vitellius, and the Christian Apostle Paul, during his two-year "house arrest" in Rome. Leases were made for extended periods—typically one to five years—and rents, which Frier categorizes as steep, were payable in annual or semiannual installments for the time period just elapsed. The tenants' furnishings, presumably of a value commensurate with their luxurious surroundings, served as security for payment of the rent.

The Roman rental year ran from July 1 to June 30; rents rose and fell with the market cycle. "After July 1," said Frier, "upper-class rents dropped sharply as landlords filled remaining vacancies at sacrifice figures."

There were, predictably, tenants who tried to outfox the system; many simply outfoxed themselves. Suetonius relates the story of a senator who, during the reign of Tiberius, stayed on in his suburban villa until after July 1, intending to sign a new lease elsewhere at "off-season" rates. "Tiberius regarded this as sharp practice," Frier recounted, "and threw him out of the Senate."

Despite the rent-now, pay-later aspect of Roman leasehold law, it was the landlord who had the edge over lessees. "A big problem for tenants," Frier said, "was that they had no property interest in their leasehold. If they were ousted, their only remedy was on the contract."

Among the justifiable reasons for expulsion were the necessity for property repair; the owner's desire to use the premises himself; the tenant's gross abuse of the property or negligence with cooking or heating fires; and failure to pay rent. On the other hand, Frier noted, the landlord was held to fairly high standards of property maintenance; a downhill slide meant tenants could legally reduce their rent or even move out. The envy of modern urban apartment dwellers, Imperial tenants could also exercise these same remedies if, for instance, new construction next door diminished the amount of natural light in their homes.

Up until the waning years of the Republic, landlords and tenants resorting to the courts to resolve their differences would have been subject to the insecurities of an essentially case-oriented, arbitrational judicial system whose notion of a fixed law was relatively insignificant. "Trials were a way to reward friends and punish enemies," Frier said. "The judicial system recognized no reliable means for determining either facts or law." How and why the system changed—leading to the founding of the legal profession—is the subject of Frier's newest book, *The Rise of the Roman Jurists: Studies in Cicero's Pro Caecina*, to be published by Princeton University Press in 1985.

As in *Landlords and Tenants*, Frier mounts a social argument for the growing popularity of autonomous law and the increasing weight given by courts to juristic opinions based on "legal science." Initially rather homogeneous, the Roman upper classes became increasingly fragmented as they grew in size and wealth in the late Republic. One result, Frier said, was the erosion of the shared values upon which they had previously relied for equitable dispute resolution. Law stepped in to fill the breach. "The upper classes tended to use it," Frier said, "as a means to compensate for the decline of an aristocratic ethos."

Among the proponents of autonomous law was Cicero. In 69 B.C., during the transitional period immediately preceding the rise of the Roman jurists, Aulus Caecina brought suit against Sextus Aebutius to recover possession of a farm. Cicero, in

The buildings of this large residential complex at Ostia, a Roman seaport, would have stood three or four stories tall.

his final speech for Caecina, championed autonomous law as necessary to preserve the social order. He also advanced the idea that the jurists' opinions should have binding force in Roman trials. (The outcome of this trial is unknown, incidentally.)

The idea that law ought to be insulated from political and social pressures rather than a product of them was not accepted without contest, however. "In 67," said Frier, whose omission of the "B.C." may temporarily nonplus the listener for whom yesteryear is not yesterday, "a statute was passed that required procedural law to be administered as it had been announced; a magistrate could no longer use his discretion simply because he favored a particular party. The statute was unpopular with the governing elite, who believed that what goes on within the judicial system should not be separate from ordinary social and political life."

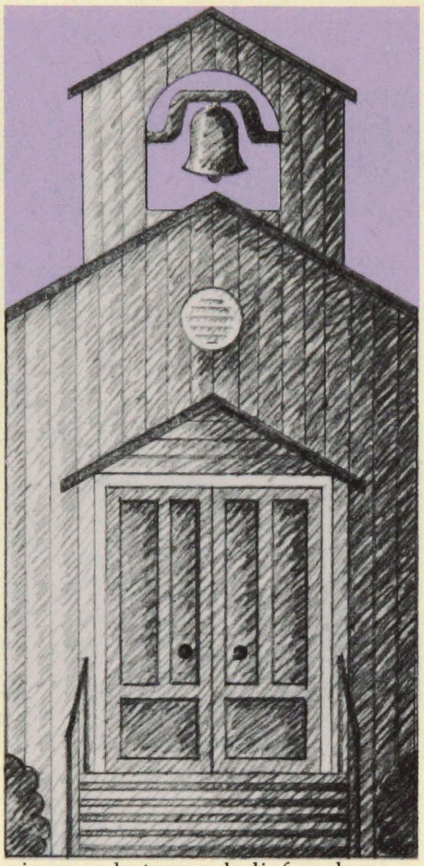
In the end, it was Cicero's notion that triumphed. The jurists, who initially played only behind-the-scenes roles in the courts, became determiners of law. They responded to the search for legal stability in a crumbling political order by intellectualizing their discipline to give it more coherence and greater rational appeal; law became a profession, and they its founding fathers. "The increasing size and complexity of the Roman upper classes," said Frier, "made it desirable to reconstitute private law on a more autonomous and professional basis; this new form of law in turn opened the way to the increased complexity of later societies."

Unlike Common Law, Roman law was professionalized from the top down, first at the level of abstract jurisprudence. "It was only at the beginning of the Empire," Frier noted, "in the first and second centuries A.D., that the profession divided into trained judges, lawyers, and notaries, for example. This development of the legal profession from the top down is partially responsible for the abstract quality of Roman legal sources."

The popular stereotypes associated with lawyers were somewhat earlier in coming, however. If not yet a stock figure, the pedantic, pretentious, socially conservative jurist was not exactly unknown in Republican social circles. "By the late Republic," said Frier, "most of these stereotypes were already well established. People respected the jurists, but they didn't necessarily like them." ◘

Consent to silence?

Professors consider silent prayer in the public schools



The recent congressional defeat of the Reagan Administration's school prayer amendment left the school prayer issue far from settled. Recently, the United States Supreme Court granted certiorari in *Wallace* v. *Jaffree*, an Alabama case concerning a "moment of silence" statute that permitted (but did not require) all public school teachers to announce a period of silence at the beginning of the school day for the exclusive purpose of meditation or voluntary prayer. The case is likely to have repercussions for the more than 20 similar statutes currently in existence.

Whether the Court will find that the statute breaches the Jeffersonian wall of separation between Church and State is difficult to predict. In the recent past, it has walked a vacillating path around the Establishment Clause, saying yes to Christmas crêches funded by municipal governments and giving the nod to legislative chaplains, but holding that thou shalt not engrave the Ten Commandments on school walls nor grant churches veto power over liquor licenses.

Like the American public on the question of school prayer, Law Professors Yale Kamisar, Terrance Sandalow, and Frederick Schauer agreed to disagree on moment of silence statutes when they aired their views this spring in a Law School panel discussion moderated by Law Professor Alexander Aleinikoff.

It was upon the question of intent that Schauer, the opening speaker, focused. Asking the overflow audience of students and faculty to imagine that neither religion nor the Establishment Clause had ever been at issue in the nation's public schools, he postulated a statute mandating a two-minute period of silence for a purpose unconnected to religion—to quiet students at the beginning of their work day, for example.

Schauer said that such a statute, viewed in the context of the different history he proposed, would present no Establishment Clause difficulties. "A mere moment of silence is not inherently invalid," he observed. Rather, he indicated, it is intent that must serve as the litmus of validity. From the legislative history of the statute before the Court, he said, it is clear that its intent is to promote school prayer. Its facial neutrality and permissibility are voided by its underlying purpose. Close judicial scrutiny of legislative intent, he added, is a valuable reminder to legislators that there are constitutionally impermissible ways of thinking.

But to Dean Sandalow, who in 1982 offered congressional testimony on the Reagan prayer amendment, which he opposed, the moment of silence concept—though not necessarily the statute involved in the current Court case—seems a reasonable solution to the school prayer dilemma. It offers a neutral, inoffensive means of accommodating religion that may be wise, he said, both for reasons of political stability and out of respect for those Americans who feel prayer should not be disassociated from such an important part of their children's lives as the school day. Noting that the moment of silence does not "force a choice among religions or between belief and disbelief," he termed it a gesture of accommodation rather than one of compromise. "We accommodate all the time in the religious arena," he added, citing the universal choice of Sunday as the most common closing day in states with compulsory closing laws.

Sandalow said that accommodation of religion in public education might also be achieved by permitting extracurricular use of school facilities by prayer groups if school facilities are generally available for other extracurricular activities. To deny school facilities only to religious groups, he asserted, "is to suggest a hostility to religion which is as alien to the American tradition as is public sponsorship of prayer."

Yale Kamisar strongly disagreed with Sandalow's support for the

moment of silence. "Considering the impressionability of children and the public school's symbolic role as a place of religious toleration," he said, "we should be more concerned with respecting the rights of religious nonconformists than with respecting the views of the majority, who seek to place the state's imprimatur on theistic religions."

Kamisar recognized the difficulties of appearing to oppose "accommodation" (he compared it to motherhood and apple pie), but he maintained that Sandalow was really asking religious dissidents to compromise their beliefs. To support his argument, he returned to the question of intent first posed by Schauer. He pointed out that none of the present moment of silence statutes were enacted until the Supreme Court invalidated audible public school prayer in the early 1960s. Moreover, the period of silence the statutes mandate is, in general, inflexible—it occurs at the time of day previously fixed for audible prayer.

According to Kamisar, a teacher announcing the moment of silence would probably employ the typical statute's language and call for "prayer or meditation." But what does "meditation" mean to a third-grader? he asked. "If the student has ever heard the word, it has probably been in connection with a place of worship," he said. "If the teacher kneels or bows her head or folds her hands, many, if not most, students are likely to imitate. In any event, if many classmates give outward signs of prayer, a religious dissident is likely to follow suit. At least some children not otherwise motivated to pray will probably be influenced to do so during the moment of silence.

"This," he concluded, "strikes me as the advancement of religion." ⊠

An echo from the school prayer tumult

Prayer breakfasts have traditionally been occasions for lay persons, under political or associational sponsorship, to deliver homilies demonstrating a group commitment to piety.

Wade McCree, Lewis M. Simes Professor of Law and former solicitor general of the United States, chose to honor that religious diversity in an unusual fashion when he was asked, in 1982, to address the membership at the American Bar Association's annual prayer breakfast. He used the podium to question the propriety of prayer in the public schools and, by extension, the propriety of the very event at which he was speaking. His remarks, reprinted below, earned their surprised author a standing ovation.

Lucy is the name of a popular philosopher who appears in the comic strip *Peanuts*, authored and drawn by Charles Schulz. Her accustomed foil is a juvenile Everyman named Charlie Brown. In a recent episode, Lucy told Charlie that on the ship of life, some passengers have their deck chairs facing the bow to permit them to see where they are going. Others face the stern so that they can see whence they came. "On the ship of life, Charlie," she asked, "which way is your chair facing?"

He replied, "I can't seem to get my deck chair unfolded."

After having accepted President Brink's invitation to speak on this occasion, I shared Charlie Brown's frustration when I addressed the chore of preparing remarks appropriate to this prayer breakfast. The fact that I had spoken at an earlier prayer breakfast in 1970 when we held our annual meeting in St. Louis did not make my preparation for this talk any easier. I wanted to say something different yet pertinent to the occasion; and I ultimately decided to speak briefly about the recently proposed constitutional amendment which, in the words of the president of the United States, ". . . will restore the right to pray." The published transcript of his remarks when he announced his support of the proposed amendment quotes the president as saying, "The law of this land has effectively removed prayer from our classrooms. How can we hope to retain our freedom through the generations if we fail to teach our young that our liberty springs from an abiding faith in our Creator?"

The proposed amendment reads:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer.

A straightforward reading of the proposed amendment in the light of current undisputed constitutional doctrine makes it evident that nothing currently prohibits *individual* prayer in public schools or other public institutions, and that no person is *required* by the United States or any state to participate in prayer. With the elimination of these two propositions as recitals of existing law, there remains in the proposed amendment only the restriction against prohibiting *group* prayer in public schools or other public institutions.

It is not clear at all what is meant by "group prayer," but it suggests the practice that the Supreme Court found offensive

to the Establishment of Religion Clause of the First Amendment twenty years ago in *Engel* v. *Vitale*, the New York Regents' prayer case.

There can be no doubt about the power of the people to amend the Constitution, including the Bill of Rights, but serious questions about the wisdom of such a course confront us. The religious clauses of the First Amendment were a considered response to the religious diversity of our young nation. Calvinists in New England, Friends in Pennsylvania, Catholics in Maryland, Anglicans in Virginia and a small dispersed Jewish community are not an exhaustive list of the several religious and denominational differences that characterized the fledgling country. Recognition of the divisiveness that religious differences can produce persuaded the proponents of the First Amendment that religious minorities should be protected from the possible tyranny of religious majorities.

In recent years, our nation has become even more pluralistic in its religious demography. Buddhism, Islam, Shintoism and Taoism are faiths that were not present in the original states but are embraced today by ever increasing numbers of new residents from Asia and the Middle East.

If in years past, a "common ground," as some would have it, could be found in a "Judeo-Christian" heritage, some of our recent arrivals would find themselves excluded from that umbrella and their children would experience the trauma of rejection or the stigmata of being "different."

Justice Frankfurter, concurring in a 1948 case invalidating an Illinois "released time" program which gave a dissenting pupil the right to leave the classroom during "group prayer," observed,

> That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children.

The wisdom of the proposed amendment has been questioned by the broadest spectrum of commentators. I need not characterize James J. Kilpatrick's usual perspective, but in writing on this subject, he said,

> One problem with institutional prayer parallels the problem often found with institutional food. The group prayers that would be sanctioned by this amendment would be canned peas—bland, innocuous, inoffensive recitations, perfunctory rituals devoid of spiritual meaning. Heartfelt prayer demands something more.

I do not gainsay the need for moral precepts to guide our young people and to try to save them from the self-destruction of drug abuse or the arbitrary rejection of parental lifestyles for sometimes bizarre and frequently harmful nihilism. But group prayer in schools is unlikely to help in this respect.

My colleague, Yale Kamisar, in a recent opinion piece in the *New York Times*, cited two incidents that he attributed to Leo Pfeffer. A young boy asked someone to identify the "good Mrs. Murphy" who would follow him all the days of his life. It developed, of course, that he was referring to the "surely goodness and mercy" of the 23rd Psalm. Equally confused was the child of the suburban commuter who daily recited, "Lead us not into Penn Station."

Moral precepts are available to teachers in abundant secular works of all ages. For example, Ralph Waldo Emerson's writings contain all the guidance a pupil requires to teach him to be a person of good character. That religious scriptures also contain guides for right conduct is beyond the point. Religious writings also contain more: creeds, religious doctrine, and beliefs about the validity of which there is often fundamental disagreement. At this very moment, Iranian Shiite Moslems are engaged in a bloody war with Iraqui Sunnite Moslems, in part, over doctrinal differences despite the fact that they both worship God and claim the same prophet.

We Americans have given the world an example of the peaceful coexistence of a wide variety of people from Europe, Asia, Africa, and South America in a nation where individual freedoms surpass those enjoyed by any other people anywhere else. This accomplishment is too precious to permit it to founder on the rock of group prayer, which demonstrably will do very little to promote genuine devotion and likely will accomplish nothing more than to prove the political power of its proponents.

If I am correct in my assessment of the limited benefits to be gained by the adoption of the prayer amendment, you must agree that its cost in terms of the discordance that it will produce is unacceptable.

We as lawyers and citizens should go forth from this prayer breakfast resolved to save our nation from the consequences of forced piety. As Tennyson wrote, "More things are wrought by prayer than this world dreams of." ✠

Faculty retirements

☐ **Olin L. Browder, Jr.,** the James V. Campbell Professor of Law and one of the nation's most respected authorities on the law of property, retired from active faculty status this spring after more than 30 years of dedicated service to the Law School.

Twice a graduate of the University of Illinois, Browder received his S.J.D. from the University of Michigan in 1941. Before joining the Law School faculty in 1953, he taught at the University of Oklahoma, practiced law in Chicago, and worked for the Tennessee Valley Authority.

One of the authors of the monumental *American Law of Property,* Browder has been a frequent contributor to scholarly journals. He is also co-author of three widely adopted casebooks in the areas of property, future interests, and trusts and estates. His work reflects the craftsman's attention to detail and a concern for the major themes of property law, skillfully set into a broad theoretical framework.

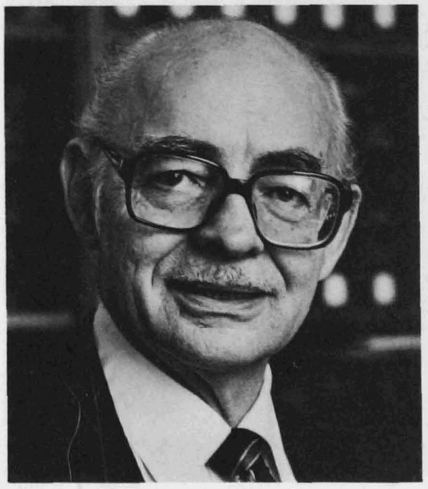
As a teacher, Browder brought to his students not only the intellectual qualities so evident in his scholarly work but a gentle humor and concern for their well-being. During his many years as director of graduate studies, he offered wise counsel to domestic and foreign students who now serve on law faculties throughout the world.

He has served as chairman of the American Bar Association's Committee on Rules Against Perpetuities and as a consultant to the Michigan Law Revision Commission in drafting the Michigan Powers of Appointment Act.

Olin L. Browder

☐ **Frank R. Kennedy,** the Thomas M. Cooley Professor of Law, retired from active faculty status this May. Widely regarded as the nation's leading expert on bankruptcy, Kennedy was executive director of the Commission on Bankruptcy Laws of the United States from 1970 to 1973. In that capacity, he was the principal architect of the recently enacted Bankruptcy Act, the first comprehensive revision of the nation's bankruptcy laws in more than three-quarters of a century.

A graduate of Southwest Missouri State University and of Washington University Law School, Kennedy also holds a doctorate in law from Yale. He began his teaching career at the University of Iowa College of Law and joined the University of Michigan law faculty in 1961. From 1960 to 1976, Kennedy served successive five-year terms, by appointment of the Chief Justice of the United States, as reporter for the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States. He also has been the reporter for the National Conference of Commissioners on Uniform State Laws in drafting the Uniform Exemptions Act; chairman of the Drafting Committee and a member of the Executive Committee of the National Bankruptcy Conference; and chairman of the Uniform Commercial Code Committee and the Secured Transactions Committee of the American Bar Association.



Frank R. Kennedy

Kennedy's bibliography, which consists of well over one hundred items, is as extensive as his government and professional service. At the same time that he has achieved scholarly and professional preeminence, he has also rendered exceptional service to the University and to the Law School. He has served as chairman of the Senate Advisory Committee on University Affairs, on the Senate Advisory Review Committee, and on university-wide search committees. Within the Law School, the faculty and successive deans have with uncommon frequency turned to Kennedy to chair or serve on committees considering the most sensitive and important issues. To his teaching, he brought an unchallengeable command of an intricate and difficult subject matter, an impressive knowledge of actual commercial practice, and the magisterial virtues of patience and compassion. ◘

A new partnership at the Law School

In March, Jonathan Lowe arrived at Hutchins Hall to assume the position of director of Law School Relations. Chairman for the past three years of the Detroit region of the Law School Fund, he joins Roy Proffitt, who will continue as director of Law School Development.

Lowe is a graduate of Oakland University and of the University of Michigan Law School (J.D. '76). Prior to accepting his current position, he was associated with the Southfield, Michigan, firm of Sommers, Schwartz, Silver & Schwartz, P.C. Much of his practice was devoted to probate and estate planning, corporate and real estate law. Upon graduation from law school, he practiced for three years with the Detroit firm of Clark, Klein, Winter, Parsons & Prewitt (now Clark, Klein & Beaumont).

Active with the Law School Fund for the past five years, Lowe is modest about his role in making the Detroit region, the largest of the fund's 17 alumni regions, the consistent financial frontrunner (last year, 1,081 gifts were received from 1,792 alumni for a total of $245,000). "Credit for our region's success really belongs to its volunteer fundraisers," he said. Contributions from the region almost doubled during his three years as chairman.

Others, including Roy Proffitt, are more forthcoming in discussing Lowe's leadership contribution. "Jonathan will be a great asset on the staff," he said. "His experience, his enthusiasm, his charm, and his conviction that it is important to keep Michigan one of the world's outstanding institutions for legal education spell success for me."

Until Proffitt retires in August of 1986, Lowe will have the benefit of Proffitt's twenty years' experience directing the Law School Fund, maintaining contact with alumni, and coordinating alumni events. Lowe's administrative duties, which overlap somewhat with Proffitt's, encompass the Law School Fund as well as the planning and scheduling of alumni meetings and reunions in Ann Arbor and across the country. He has already travelled to alumni gatherings in Midland, Des Moines, New York City, Philadelphia, and Pittsburgh.

Despite the allure and excitement of private practice, Lowe is delighted to be back at the Law School. Recently, he was asked how he liked his new job. "Are you kidding?" he said. "I love it. I have to pinch myself to make sure it's real." ◘

Roy Proffitt, left, discusses Law School Fund operations with Jonathan Lowe.

New alumni directory planned

If you've tried to locate a Law School chum through the 1981 Law School Alumni Directory, chances are you already know it's time for an update. Since the '81 Law School Alumni Directory was published, half the addresses of the nearly 14,000 alumni listed have changed, and over a thousand students have graduated from the Law School.

A new University of Michigan Law School Alumni Directory is slated for publication later this year. A successful directory will require your help. You will soon receive, or perhaps have already received, a questionnaire and formal announcement of the '84 Directory. Your prompt completion and return of the questionnaire is essential to the directory's accuracy and completeness.

In addition to furnishing the Law School with information needed to compile the alumni listings, the questionnaire gives alumni an opportunity to order the directory at the special pre-publication price of $20 per copy. A limited number of additional copies will be available after publication at a cost of $25; they will be sold on a first-come, first-served basis.

The Law School will continue to publish new alumni directories at three-year intervals. To make the '84 edition useful to you for the next three years, we ask that you make your questionnaire "priority" mail. ◘

Professor becomes federal magistrate

In December, Professor Steven D. Pepe, a Law School alumnus and director of the Clinical Law Program for the past 10 years, was sworn in as United States Magistrate for the Eastern District of Michigan. He was chosen for the newly created position through a merit selection process that involved judges of the Federal Court for the Eastern District and a committee composed of federal bar members and lay individuals. There were two hundred applicants for the position.

With the passage of the Federal Magistrate Act of 1979, magistrates' duties were considerably enlarged, and Pepe's tasks go well beyond the issuing of warrants and the setting of bond. Magistrates are the judicial officers involved in all the preliminary proceedings in both civil and criminal cases. They review Social Security cases on appeal from administrative law judges and hear prisoners' petitions—primarily the escalating number of civil rights petitions. Under the amended court rules, they will also be actively engaged in pretrial case management and discovery.

Upon receiving his J.D. in 1968, Pepe clerked for the Honorable Harold Leventhal of the U.S. Circuit Court of Appeals for the District of Columbia and spent a year as a staff attorney with Neighborhood Legal Services in Washington, D.C. Before joining the Michigan faculty, he pursued graduate studies at the London School of Economics and at Harvard, which awarded him the LL.M. in 1977.

Speaking at Pepe's swearing-in ceremony, Professor of Law and former Dean Theodore St. Antoine hailed his colleague as a pioneer in the area of clinical legal education who had acted as "a bridge between the academic level of legal inquiry and the more practical level of practice one encounters in the courts."

Pepe's appointment as a magistrate will allow him to continue his involvement with legal issues affecting the poor while offering him a much fuller involvement in a broad range of federal litigation. He will continue to teach at the Law School as his schedule permits. Next winter his "docket" includes Lawyers and Clients. ◘

Steven D. Pepe is sworn in as a United States magistrate by U.S. District Court Judges Charles W. Joiner, center, and John Feikens, right.

The nicest guests

A number of outstanding visiting faculty have enriched the Law School's curriculum and intellectual life this year.

Five visiting faculty members spent the fall and winter semesters on campus:

☐ **Francis X. Beytagh, Jr.** visited from the University of Toledo College of Law, of which he is dean. He taught administrative law, constitutional law, and two sections of lawyers and clients. A graduate of Notre Dame and of our Law School (J.D. '63), where he was editor in chief of the *Law Review*, Beytagh is also co-author, with Thomas Kauper, of a textbook on constitutional law. He has, in addition, written numerous scholarly articles on the Warren and Burger Courts, as well as on freedom of the press, legal education, and judicial review in selective service cases. After graduation from the Law School, Beytagh served as senior law clerk to Chief Justice Earl Warren. Subsequently, he was assistant to the solicitor general in the Department of Justice.

B R I E F S

☐ **Bryant G. Garth** visited from Indiana University School of Law. Garth, who is a graduate of Yale and of Stanford Law School, also holds a doctorate from the European University in Florence. He is the author of *Neighborhood Law Firms for the Poor: A Comparative Study of Recent Developments in Legal Aid and in the Legal Profession* (1980). The co-author of works on access to justice and on controlling local growth, he has also written articles on class actions, legal aid, and comparative law. At the Law School, he taught courses on civil procedure and European legal systems, and a seminar on human rights.

☐ **Ellen Gesmer,** a graduate of Radcliffe and of Yale University Law School, is director of litigation at Bedford-Stuyvesant Community Legal Services in New York City. A former intern at the Center for Law and Social Policy in Washington, D.C., and a summer fellow at the Kennedy Institute of Politics, Gesmer spent the academic year directing students in the Law School's Child Advocacy Clinic.

☐ **Alan S. Hyde** has taught at Rutgers University School of Law since 1978. He is a graduate of Stanford University and of Yale University Law School. After receiving his J.D., he worked for a year as staff attorney in the office of the General Counsel of the National Labor Relations Board. The co-author of a casebook on labor law and of articles on labor relations, liberalism, and the concept of legitimation in the sociology of law, he taught courses in contracts, labor law, and unions during his year at the Law School.

☐ **Frederick F. Schauer,** the Cutler Professor of Law at the College of William and Mary, offered courses on injunctions, constitutional law and theory, and the First Amendment. The co-author of two books, *The Law of Obscenity* and *Free Speech: A Philosophical Enquiry,* Schauer has written many articles on the philosophical and legal aspects of free speech. He holds an A.B. and an M.B.A. from Dartmouth College and a J.D. from Harvard Law School. He has taught law at the University of West Virginia and was a visiting Senior Scholar at Cambridge University. He joined the permanent Law School faculty this July.

Five faculty members visited for the fall term only:

☐ **Clayton P. Gillette,** an authority on commercial law who holds degrees from Amherst College and the U-M Law School (J.D. '75), arrived from Boston University School of Law to teach torts and commercial transactions. Prior to joining the Boston University law faculty, Gillette practiced in New York with Cleary, Gottlieb, Steen & Hamilton and clerked for the Honorable J. Edward Lumbard of the U.S. Court of Appeals for the Second Circuit. He is author of a book on the law of municipal bonds.

☐ **Clark Havighurst,** a specialist on antitrust and on legal issues in health care, visited from Duke University School of Law. A graduate of Princeton University and of Northwestern University School of Law, he has served as a consultant to the Federal Trade Commission, has been a fellow with the World Health Organization, a scholar-in-residence at the Institute of Medicine at the National Academy of Sciences in Washington, D.C., and a scientist at InterStudy Health Services Research Center in Minneapolis. At the Law School, he taught Antitrust Analysis I and a seminar on health care problems.

☐ **Joachim Herrmann,** an authority on German and comparative law, visited from the University of Augsburg in the Federal Republic of Germany. He holds a law degree from the University of Freiburg and an LL.M. from Tulane University. He has also studied law at the University of Basel. His Law School course offerings were comparative law and comparative criminal law procedure.

☐ **Ted L. Stein,** a specialist in international law, law and marine affairs, and civil procedure, visited from the University of Washington School of Law. A graduate of Princeton University and of Harvard Law School, he was clerk to the Honorable Irving L. Goldberg of the U.S. Court of Appeals for the Fifth Circuit. He has also been an attorney in the Office of the Legal Advisor in the Department of State. During the fall, he taught international law and a seminar on the theory of civil procedure.

☐ **Joseph Weiler** visited from the Department of Law at the European University Institute in Florence, Italy. The author of numerous books and articles on a wide range of topics in European law, Israeli law, and international relations, Weiler taught Common Market law and a course on the Arab-Israeli conflict. He holds law degrees from the universities of Sussex and Cambridge in England, as well as a diploma in international law from the Hague Academy of International Law in Holland and a Ph.D. in European Law from the European

University Institute. He will return to the Law School in the fall of 1985 to join the law faculty.

During the winter semester, three additional visiting faculty taught at the school:

☐ **John F. Dolan,** a specialist in commercial law at Wayne State University, taught commercial transactions. After graduating from law school at the University of Illinois, where he also received his undergraduate training, Dolan clerked for the U.S. District Court in Danville, Ill. He then joined the firm of Davis and Morgan in Peoria. He has also been a visiting professor at the State University of Utrecht in Holland.

☐ **Erica A. Ward,** a Law School graduate (J.D. '75), returned for the semester from the Washington, D.C., firm of Skadden, Arps, Slate, Meagher & Flom. Ward, who taught a course in energy law, has held several high-level positions in the U.S. Department of Energy and has served the White House as associate director, Energy and Natural Resources. She has also served as staff counsel to the U.S. Senate Select Committee on Ethics (Korean Inquiry). After graduating from the Law School, she was an associate with Wilmer, Cutler & Pickering. She received her undergraduate training at Stanford University.

☐ **Yozo Yokota,** a professor of law at International Christian University in Tokyo, Japan, taught courses on international organizations and on the law of the sea. Yokota received his B.A. in international law from International Christian University and his LL.M. and LL.D. from the University of Tokyo's Graduate School of Law and Politics. He has been a visiting scholar at Columbia University and has served as counsel to the World Bank in Washington, D.C. In 1983, he was a visiting professor at the University of Adelaide in Australia. A member of the Board of Councillors of the Japanese Association of International Law and director of the General Affairs Department of the World Law Association of Japan, Yokota has traveled abroad for his government as an observer at the U.N. International Law Commission and as a member of the Research Mission on International Commercial Arbitration. He is the author of the 1982 book *International Society and Law,* as well as of numerous articles on international law.

Correction: Who was that Justice I saw you clerking with?

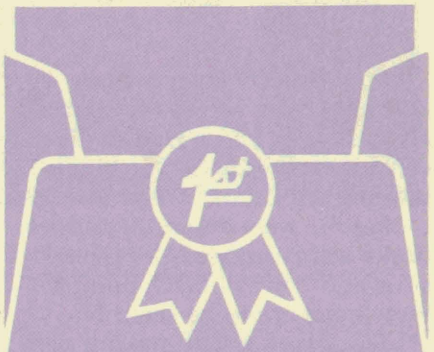
In the last issue of *Law Quadrangle Notes,* the names of the two alumni who served as Supreme Court clerks during the 1983-84 term were inadvertently switched.

It was incorrectly stated that Peter Michael Lieb, J.D. '82, was clerk to Supreme Court Justice Byron White. He was clerk to Chief Justice Warren Burger. The clerkship he previously held was to the Honorable Amalya Kearse, United States Court of Appeals for the Second Circuit.

Richard Irving Werder, J.D. '82, was clerk to Justice Byron White and not, as stated in the winter issue, to Chief Justice Burger. His previous clerkship was to the Honorable Harry Edwards, United States Court of Appeals, of Columbia Circuit.

The list of 1983 alumni holding clerkships should be amended to include Paul Bork, clerk to the Honorable Paul F. O'Connell, 21st Judicial Circuit of Michigan.

Apologies to all concerned. ◘



The envelope, please —

In April, *Law Quadrangle Notes* was selected for a prestigious Council for the Advancement and Support of Education Exceptional Achievement Award in the category of Periodicals Publishing Improvement. The magazine was totally redesigned in the fall of 1982 by Law School Editor Pat Sharpe and University Publications Graphic Artist Carol A. Gregg and Production Editor Carol Hellman. The CASE award was based on both the amount of improvement shown and the high standard represented by the final product.

Law Quadrangle Notes was singled out for recognition from a field of 96 periodicals. The jury, which met in New York City, included editors from Time Inc., *Newsweek,* Condé Nast, and the *Wall Street Journal,* all chosen not only for their professional qualifications but also for their familiarity with university publishing. The magazine's current editor is Susan Nisbett. Professor Yale Kamisar is the Law School's publications chairman. ◘

In pursuit of life's "grand follies"

Conference explores careers in public interest law

by Patricia Polach

One Saturday last February, 20 attorneys from across the country arrived at Hutchins Hall to discuss careers with 150 Michigan law students.

No jobs were offered. No flybacks were arranged. Interview suits and pairs of black pumps were nowhere to be seen. No student asked about making partner, but several did ask about making a living representing clients who couldn't pay.

The attorneys in attendance were not placement season interviewers from large corporate firms but practitioners, some of them alumni, conducting workshops on dispute resolution, lobbying, civil rights and other alternative legal careers at the Placement Office's annual Public Interest Law Conference.

"Traditional corporate firms are the dominant presence here during interviewing season," said Nancy Krieger, director of Placement. "The Public Interest Law Conference reminds students of other career options. It also provides information, support, and networking for students who want more than a personal career, who see legal work as a force for the public good."

Civil rights activist and former Attorney General Ramsey Clark opened the conference with a ringing challenge: "Unless the legal profession finds a way to provide services for people who cannot pay, the American ideal of equal justice under the law means equal justice under the law for those who can afford it." He urged the standing-room-only audience to think about the paradox at the heart of Anatole France's often-quoted statement: "The law in its majestic equality prohibits the rich as well as the poor from sleeping under bridges, stealing bread, or begging in the streets."

Clark grimly recounted the barriers to providing legal services to the full spectrum of society. "The tension of public interest law," he said, "is the tension between what is culturally valued—that is, money—and the fact that [practicing] law for the downtrodden is seldom lucrative." He counselled students to examine themselves and their culture. "If you are dominated by material values," he said, "the probability of your being happy or successful in public interest law is not very high. And if everyone is dominated by these values, the probability of survival of the species is not high. So there we are."

Cultural barriers are not the only ones public interest lawyers face. In words echoed repeatedly by the guest speakers at the Saturday conference workshops—and by folksinger Fred Small, J.D. '78, in his songs following the Friday evening potluck (see story, page 21)—Clark enumerated the external obstacles that hinder equal representation for the poor and impede litigation for social change. "Cutbacks on Legal Services' funding and mission, limitation of class actions, and taxation of costs to unsuccessful plaintiffs in Title VII suits—wherever you see techniques developed to fund public interest law," he said, "you see the other side hammering hard to limit or destroy them."

Despite the psychological, social, and political obstacles he outlined, Clark's message was as positive as it was urgent and passionate. "The possibility—and fact—of progress is undeniable," he said, drawing upon his civil rights experience. "It is only a question of will." Ticking off some of the problems faced by our society—housing, discrimination, arms limitation, and the preservation of constitutional freedoms—he urged students to choose a problem to care about and work for its solution. "Shaw said life is a series of grand follies. Find your folly and grab at it while you have the chance."

In workshops on civil rights, employment discrimination, labor law, legal services, and private practice, speakers recounted their first-hand experiences with the obstacles Clark mentioned. One lawyer left Legal Services when the Reagan administration restricted her ability to represent undocumented aliens. Another lawyer described the difficulty of getting discovery in employment discrimination cases. Yet another discussed the new defense bar tactic of seeking attorney fees against unsuccessful civil rights and employment discrimination plaintiffs.

Speakers also offered concrete examples of public interest law's rewards. "You see more than just money changing hands when you win a voting rights case," said alumnus Elliott Andalman, who practices civil rights law in Mississippi (see story, page 19). "You see real change." David Piontkowsky, an employment discrimination attorney practicing in Detroit, expressed the excite-

ment of making new law in an area where little state appellate law exists.

Most conference speakers believed the opportunity for professional growth and satisfaction in public interest law was outstanding. Legal Services attorneys agreed that their jobs afforded young lawyers unparalleled opportunity for early litigation training and the opportunity to conduct far-reaching impact litigation. "The newest attorney in our office is now lead counsel in a large prison rights case," said Rick McHugh of the Legal Aid Society, Inc., in Louisville, Kentucky.

A common thread of advice ran through the workshops. "If our experiences have one lesson for you," said Susan Gzesh, an immigration lawyer in Chicago who recently won political asylum for South African poet and anti-apartheid activist Dennis Brutus, "it is that you must work together in groups. Tap into the expertise of other lawyers involved in similar battles, and share your working knowledge with others." She cited as an example the recent publications of the National Lawyers Guild Immigration Committee, which pooled the experience of a number of progressive lawyers in immigration.

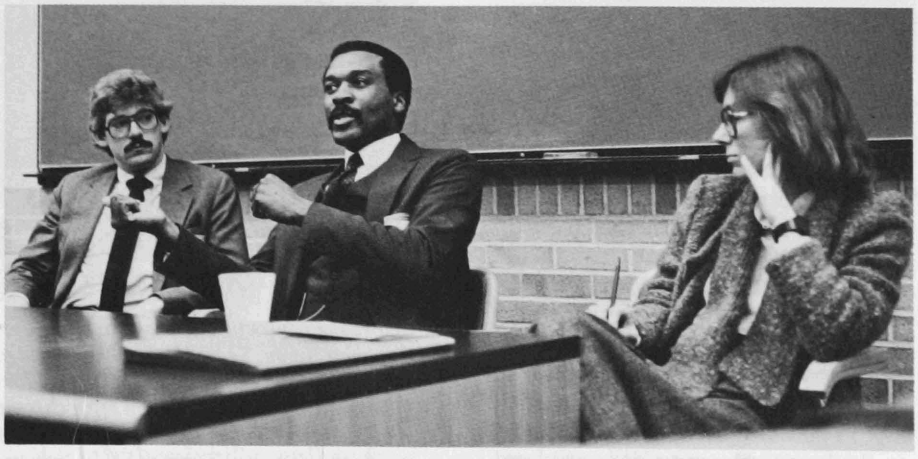
Gzesh's advice fell on fertile ground among Michigan students interested in public interest law, who may often feel like outsiders in a student body most of whose members plan traditional corporate careers. Visiting attorneys may not have provided any job offers, but they spelled out the pros and cons of pursuing the "grand follies" of which Ramsey Clark spoke. ◘

Patricia Polach will receive her J.D. from the Law School this May.

Alumni Zena Zumeta and Ronald Mock discussed alternative dispute resolution.

Former U.S. Attorney General Ramsey Clark was the keynote speaker.

Students gave careful scrutiny to the day's panel discussions.



Employment discrimination litigation was the subject in a workshop conducted by attorneys (from left) David Piontkowsky, John Bailey, and Debbie Gordon.

Tender talk

Campbell competitors debate timely corporate issue

At first, Delaware's T.T. Biddle Company was just another shareholder in Michigan's Aim Corporation, a firm whose business throughout the United States produced annual sales of $10,000,000. The turmoil began when Biddle offered to purchase Aim's entire assets at a price that would have returned $30 per share on stock that was not publicly traded and for which there was no market. Aim's directors weren't interested, but their corporate general counsel, Mary Beth Tattle, urged that the shareholders be allowed to vote on Biddle's proposition. So Aim's directors dismissed her.

Tattle had stock to sell and a tale to tell, however. She contacted Biddle's representative, Veria Vestige, offering to sell her own 400 shares of Aim, and disclosing various possibilities for increasing Aim's meager annual profit of $50,000. She contended that the three principal officers, who each held approximately five percent of the corporation's shares, were missing opportunities through inattention to the business. She also disclosed to Vestige the officers' salaries, which totalled $900,000 and whose amount had not been revealed in financial statements to Aim's stockholders. Were they reduced to reasonable figures, the company annual earnings would be $400,000, not $50,000, she said. A few months later, when Biddle decided to acquire a majority of Aim's shares, Tattle supplied the company with the names of shareholders who might be willing to sell and whose shares could be purchased without alerting Aim's officers.

Whether Biddle's subsequent courting of Aim's shareholders constituted a tender offer and whether insider trading was involved in Biddle's efforts to gain control of Aim were two of the questions addressed by participants in the finals of this year's Campbell Competition, celebrating its sixtieth anniversary. The case, which owed both its facts and its protagonists' Dickensian names to Professor Emeritus Alfred F. Conard, raised issues in two areas: the application of federal and state tender offer rules to an undisclosed program of acquisition of unregistered securities; and the application of federal antifraud provisions to the use of unpublished information received from an employee in connection with such acquisitions.

Charles M. Greenberg and Joseph R. Gunderson were counsel for the petitioner, the T.T. Biddle Company, on the tender offer issue. Greenberg, presenting the team's winning oral argument, based his contention that Biddle's solicitation was not a tender offer on the Securities and Exchange Commission's eight-point test. Furthermore, he said, the respondents, who were Aim's three principal officers, lacked standing because their interests were those of target management rather than those of shareholders.

Before the competition, the Campbell court and finalists posed for this photo in the Faculty Common Room. Seated, left to right (judges): Associate Dean Edward H. Cooper; Hon. Albert J. Engel, U.S. Court of Appeals for the Sixth Circuit; Hon. John Minor Wisdom, U.S. Court of Appeals for the Fifth Circuit; Hon. Robert L. Carter, U.S. District Court for the Southern District of New York; Professor Alfred Conard. Standing, left to right (students): Stephen Thomas Erb, Michael John Rizzo, Darrell J. Graham, Juli A. Wilson, Jonathan Frank, Charles M. Greenberg, Joseph R. Gunderson.

(Later in the proceedings, the Honorable John Minor Wisdom, Circuit Judge, United States Court of Appeals for the Fifth Circuit, likened management to foxes taking a course of action to protect the chickens.) Jonathan Frank served as the respondents' counsel. He faced tough questioning, particularly from Judge Wisdom, about the respondents' salaries.

On the insider trading issue, however, the court, which bases its decisions on the contestants' skill rather than on the case's facts, declared counsel for Aim the winner. In her oral argument for Aim, Juli Wilson, whose partner was Darrell J. Graham, contended that Mary Beth Tattle had breached her fiduciary trust to the shareholders and that Aim's officers had standing to seek preventive relief. Michael John Rizzo presented oral argument for the petitioner; his partner was Stephen Thomas Erb.

In addition to Judge Wisdom, this year's distinguished court included the Honorable Albert J. Engel, Circuit Judge, United States Court of Appeals for the Sixth Circuit; the Honorable Robert L. Carter, District Judge, United States District Court for the Southern District of New York; Associate Dean Edward H. Cooper; and Professor Emeritus Alfred F. Conard. ◘

Of manners and morals in private practice

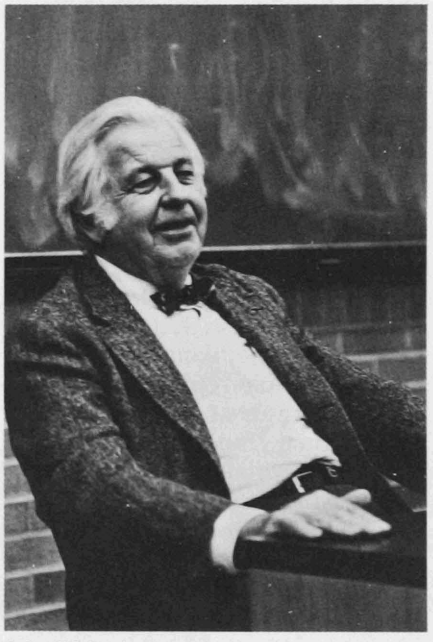
John Pickering is DeRoy Fellow

Since their initiation in 1980, the DeRoy Fellowships have brought leading lawyers and public officials to the Law School to share their experiences and observations with students in the classroom and in a variety of informal settings. The endowment that supports the fellowships was established by the trustees of the Helen L. DeRoy Testamentary Foundation: Leonard H. Weiner, 1935, Chairman of the Board; Gilbert Michel; and Arthur D. Rodecker.

John H. Pickering, the 1984 DeRoy Fellow, was in a special position to offer counsel to members of the current student body. A partner in the Washington, D.C., law firm of Wilmer, Cutler & Pickering, he has had a distinguished legal career as a member of the private bar. He has participated in landmark constitutional cases like *Youngstown* v. *Sawyer* and *Powell* v. *McCormack*, and his extensive public service includes chairmanship of the Advisory Committee on Procedures for the United States Court of Appeals for the D.C. Circuit and the presidency of the District of Columbia Bar.

He is also twice a Michigan graduate (A.B. '38, J.D. '40), an alumnus whose dedication and commitment to the Law School were most recently manifested in his chairmanship of the extraordinarily successful capital campaign completed in 1980.

Pleased to serve his *alma mater* again and to have the chance to visit the Law School for an extended time period, Pickering dove into his assignment with gusto. His two-week calendar, already chock-a-block with visits to classes in administrative law, antitrust law, constitutional litigation, corporate criminality, environmental law, mass media, and lawyers and clients, to name just a few, grew fuller still as faculty, individual students, and



John Pickering

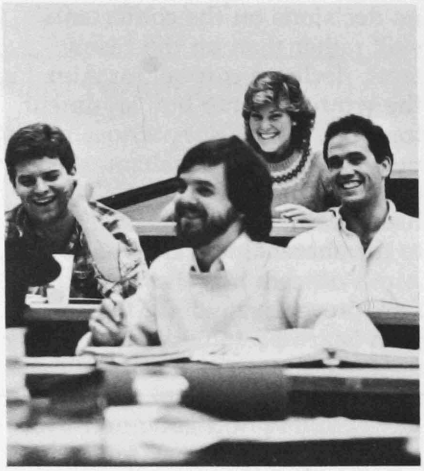
student organizations sought him out. No one who asked to see him was refused, despite a schedule that made the hectic pace at his law firm seem leisurely by comparison. "I'm like Ado Annie," Pickering grinned when it was all over, "I just couldn't say no."

Yet it was not without trepidation that Pickering approached his stay. "I'm not a legal scholar,"

he said in an interview. "I haven't deeply explored or written a lot on one topic. I have a lot of broad knowledge." Faculty never doubted that he would make a valuable contribution to their classes; Pickering, however, seemed particularly pleased with the experiential dimension his comments added to class discussion. "In every course I participated in," he said, "they were at a point where something I had worked on was current and choice." His firm's work (for automotive clients) on the National Traffic and Motor Vehicle Safety Act was pertinent when Joseph Vining's corporate criminality class discussed the Pinto case; in Donald Regan's constitutional law class, the subject was the Youngstown steel seizure case, a matter Pickering had lived through.

With his bow tie and shock of white hair, Pickering bears an uncanny resemblance to the eminent jurists whose portraits adorn the walls of Room 100, Hutchins Hall. Given the likeness, his unimpeachable reputation, and his active interest in lawyers' professional responsibilities, it was not surprising that many of the questions students posed to him focused on moral and ethical issues.

Both in and out of class, however, Pickering also received a fair number of practical questions: What impresses prospective employers most? (good grades); Is legal training valuable in nonlegal government positions? (yes). He was also glad to offer predictions for the future, which included more prepaid legal service plans, greater specialization (with corporate clients selecting outside lawyers on a per-case basis), greater client interest in litigation risk analysis, and the demise of the solo practitioner. Tomorrow's lawyer will face the problem of



Pickering's magisterial style clearly suited his Law School clientele.

providing legal services not only to the poor but to the middle class, who are "too affluent to receive free legal services and not sufficiently affluent to get as good legal services as they need."

As Pickering dispelled some of what he called the "mystique and mythology" surrounding practice in the "real" world, he not incidentally dispelled some common myths about the private practice lawyer, stereotyped, Pickering said, as someone who has no social conscience and who is just the client's hired gun.

He commented that "a lot of the students were surprised how much, coming from the private sphere, I was in agreement with their professors on the problems and whether the solutions to them were very good. In Joe Sax's environmental law class, the students expected that we would throw thunderbolts at each other. But I agreed with his analysis that the regulatory scheme of the Clean Air Act [regarding automobile pollution] had not worked well."

Similarly, in David Chambers' lawyers and clients class, Pickering expressed dismay at job candidates who do not even inquire about his firm's *pro bono* work. He also allowed that he had worked on cases in which his sympathies lay with the other side. Nonetheless, he upheld the public interest value of providing competent counsel even in such cases. "By helping clients to know their rights and responsibilities, and by making the system work, you are serving the public interest," he said. He noted that large law firms "are best at doing some things." In their *pro bono* work, for example, they can take on major matters without compensation that would not be handled otherwise; they can make individual lawyers within the firm available to represent poor individuals; provide leadership for organized bar and law reform activity and serve on the boards of public interest groups; and help legal education with dollars as well as time.

Pickering did not minimize the conflicts of interest that can arise between a firm's paying work and its *pro bono* activities—his firm's automobile industry connections necessarily limit its *pro bono* air pollution work, for example. But the challenge he offered to Chambers' students was hardly different from the one voiced by former Attorney General Ramsey Clark a month earlier at the Law School's Public Interest Law Conference.

"Many of you," Pickering said, "may be sitting here because you hated the sight of blood and didn't want to be a doctor. Others of you may be troubled by working for the haves rather than the have-nots, or by the high salaries that you'll be paid. . . . The license to practice is not just one to earn a living. The legal system is better now than when I graduated, but it needs improving. I challenge all of you to work to improve it, and to take seriously the public interest commitment." ⊠

Report from "Michigan South"

Trials and triumphs in a Mississippi town

The law firm of Andalman Adelman & Steiner, P.A., located in Hattiesburg, Mississippi, can rightfully take pride in the voting rights and employment discrimination cases it has handled in its 10-year existence. That it is also proud of its own hiring policy—*de facto* restrictive—is hardly paradoxical: each of its three lawyers is a U-M Law School graduate.

Elliott Andalman, J.D. '73, is a founding partner of the firm he dubs "Michigan South, an outpost of the U-M." A Chicago native who says his soft Mississippi drawl fools only those who have never ventured south of the Mason-Dixon Line, Andalman came north in February for a "home office" appearance at the Law School's Public Interest Law Conference. He left partners Michael Adelman, J.D. '67, and Alison Steiner, J.D. '75, holding down the fort in Hattiesburg while he told students about the civil rights practice he and Martha Bergmark, J.D. '73, established after graduating from the Law School. Bergmark left the firm in 1978 to head the newly organized Southeast Mississippi Legal Services Corporation.

Andalman credits Bergmark, the Mississippi native to whom he is married, with the idea of opening a civil rights practice in her home state. "I'll take credit for being crazy enough to agree to go with her," he said, with an amiable smile.

"When I look back," he added, shaking his head, "I think we were crazy to hang out our shingle and open our doors straight out of law school. I would recommend to others to do an internship first, to get their feet wet. On the other hand, there's no better way to learn than to go out and do it. And with the skills we got from the U-M, we were successful at doing it."

That Mississippi, in 1973, had no rules modeled on the federal rules of procedure did not make the task before them any easier. Nonetheless, they passed the state bar examination—not required, then, of Ole Miss graduates—the first time around.

Andalman and Bergmark had chosen Hattiesburg, a city of 40,000 located 60 miles from the Gulf coast and 100 miles from New Orleans, because it was the site of both the federal district court and the University of Southern Mississippi, which had a basic collection of American legal materials. Its status as a legal center notwithstanding, Hattiesburg suffered from a lack of legal services for the poor and in the area of civil rights.

The town did not exactly set out the welcome mat for the young civil rights lawyers who intended, willy-nilly, to call it home. The worst of the civil rights violence had passed, but it had left in its wake an environment that was still quite hostile. Aware that their law firm was no one's ideal tenant, Andalman and Bergmark bought a house to use as both office and residence; their property insurance was cancelled with the first civil rights case they handled. "No one would insure us because they thought the house was in jeopardy," Andalman said. "We finally had to go out of the city to get insurance."

That was the least of their troubles. Hattiesburg had placed Andalman and Bergmark within striking distance of the only two clients—albeit nonpaying clients—they had: two fledgling labor unions that operated on budgets too meager to qualify as shoestring. "We had a plan," Andalman explained. "By work-

The "U-M South" family (clockwise from bottom left): Alison Steiner, Michael Adelman, Elliott Andalman, Martha Bergmark, and Amy Adelman, a Michigan graduate in music.

ing for these two unions, we'd build a client base to service and that would support our office with workmen's compensation claims and personal injury suits. But it wasn't meant to be. Both folded within a year after we arrived."

Meanwhile, the hostility that had prompted the local bar association to balk at letting Andalman and Bergmark become members now manifested itself in a far more frightening form: in the fall of 1974, Andalman was indicted for obstruction of justice. "I always refer to it as obstruction of *in*justice," he quipped. "I was advised to take it as a sign of our successful practice."

The danger in which that practice was placed was all too real. "They were interested in either running us out of town or convicting us," Andalman said. "I had no confidence of getting a fair trial. It was a felony offense. I would have lost my license to practice and possibly spent time in jail." (The first black lawyer practicing in the area was also indicted, Andalman reported, and in 1973 was sent to the penitentiary.)

Andalman was not encouraged by his opponents' desire to offer him swift justice. Set for a mere eight days after the indictment, the case was removed to federal court on the day it was to go to trial. There, thankfully, it languished for a year. "There was a new election and the judge behind the indictment was no longer in office," Andalman explained. "The charge was dropped."

Changing times have brought modest prosperity to Andalman's firm, which has established an impressive civil rights record. Because of the cases it has accepted—and won—women are now working as security guards at the local university and the secretarial staff of the second largest manufacturer in the area, the Northern Electric Company, is now racially integrated.

In the area of voting rights, the firm's successes have been particularly visible. A suit to halt racial gerrymandering in nearby Scott County, Mississippi, has resulted in the election of the first black person to that county's governing body. In their own town, Hattiesburg, the firm has just won a seven-year court battle to end at-large municipal elections, an institution that had effectively deprived the city's 34 percent black minority of representation in city government. "For the first time in its history, I believe Hattiesburg will have an integrated city council after the next election in 1985," said Andalman.

To U-M Law Professor David Chambers, who has remained in contact with Andalman, Bergmark, and their associates, "Michigan South's" achievement is as much the provision of high quality legal services to small-town working class families as the group's civil rights work. The Andalman firm was one of the first in southeastern Mississippi to undertake Social Security disability law cases; it has remained active in developing that area. General personal injury claims, domestic law cases and criminal defense are other practice mainstays.

Since leaving the firm to direct the Southeast Mississippi Legal Services Corporation, Bergmark has continued to lead efforts to make legal services available to people of low means. (The firm's members were leaders in setting up the five-year-old corporation—and in applying for federal funds—over the local bar association's opposition.)

Today, the corporation, which is headquartered in Hattiesburg, employs six attorneys, serves nine counties, and has a half-million-dollar budget. While working at meeting the day-to-day legal needs of the poor, the corporation has also participated in its share of impact litigation. Last year, it won a decision that held utility rate increases under bond unconstitutional. The result was a refund of approximately 200 million dollars to consumers. Staff members have been responsible for drafting and receiving passage of the Mississippi Protection from Domestic Abuse Act, obtaining improvement in jail conditions, and remedying due process violations in the state's unemployment compensation law.

Like many other legal services directors, however, Bergmark is concerned about the enterprise's continued viability as funding cutbacks and new government regulations limit its ability to function as an aggressive advocate of the poor.

A decade after the start of their Mississippi adventure, it is the continuing sense of challenge, as well as an acquired taste for small-city living in the Sun Belt, that keep Andalman and the others in Hattiesburg. Mississippi has more black elected officials than any state in the country and some of the nation's most integrated schools. But it also has those who "still actively fight integration and sharing power with the black community," Andalman added. "We have white elected officials who maintain under oath that they know of no discrimination in their lifetime! There has been progress, but there is also an intransigence to people's thinking."

Like their associates, Andalman and Bergmark have come to regard Hattiesburg as a congenial location from which to battle that intransigence. He and Bergmark have restored a home on the National Historic Register; they

enjoy raising their two children less than a mile from their offices.

Partner Michael Adelman had been practicing law in Detroit when he and his wife, Amy (also a U-M graduate, '62, Music), and their two preschool-age sons moved to Hattiesburg in 1974. "Originally, we were going to try things out for a year," Adelman said. The Adelmans' sons are now in junior high school and the family still calls Hattiesburg home. In January, Michael completed his first marathon. Two years ago, he published his first short story, "The Deputy," set—naturally—in south Mississippi.

Alison Steiner, daughter of Peter Steiner, professor of economics and law and dean of the U-M's College of Literature, Science, and the Arts, clerked with the firm during law school summers. From her first contact, she said, she felt that the practice was what she wanted: "It was as thrilling for me when I was asked to join the firm as it was for my classmates to get offers from places like Covington & Burling!"

Nine years later, Steiner is still enthusiastic about her choice. "I feel that what we are doing has really made a difference, and that is very gratifying to me," she said. She also enjoys the variety of general practice: "One day you're in trial on a Title VII case, the next you're advising a community theatre on how to draw up bylaws for its nonprofit corporation. It can get crazy sometimes, but it's rarely boring!"

The firm's only single member, Steiner is often asked about Hattiesburg's social life. Admitting that she occasionally feels "like a 'yuppie' out of water," she hastened to add that New Orleans' proximity compensates handsomely for Hattiesburg's social shortcomings. ◘

Solo practitioner

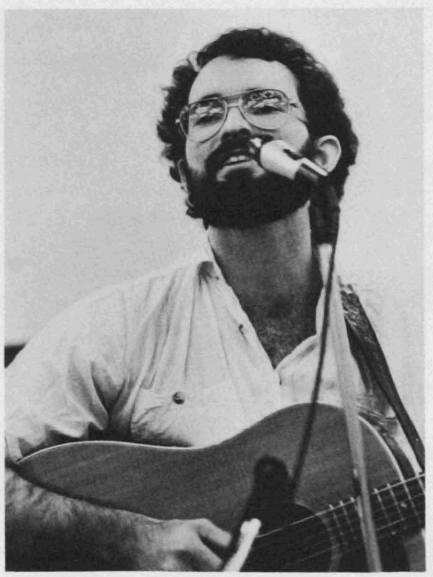
Fred Small makes music in the public interest

It was on the morning of his first Law School examination that Fred Small, J.D. '78, wrote his first song. The song was about land use; the examination, he recalls, was in civil procedure.

The subject of Small's second examination goes unrecorded, but Small's songs no longer do. After "playing the game" sincerely and well enough in law school to earn his professors' esteem, make *Law Review*, and land his dream job with the Conservation Law Foundation of New England, in 1980 Small traded in his three-piece suit for his guitar, the lawyer's settled existence for the minstrel's wandering life. He now has two albums and a hit 45, "Walk on the Supply Side" (a spoof of Reaganomics à la Lou Reed), to his credit.

In February, Small returned to Michigan for a Friday evening hootenanny with students attending the Law School's Public Interest Law Conference. The choice was apt: Small is a topical balladeer in the tradition of Woody Guthrie, Tom Lehrer, Malvina Reynolds, and Tom Paxton, a chronicler of factory workers and farmers, school teachers and housewives, athletes and people in wheelchairs—as well as of love, polar bears, thermal underwear, and Pringles Potato Chips.

He is also a successful balladeer. Pete Seeger sings his songs, as do Charlie King and Kristin Lems. Among his engagements at rallies and folk festivals he counts appearances with Seeger, Paxton, Holly Near, and Bonnie Raitt. This summer, he will perform for the first time at the prestigious Philadelphia Folk Festival—a long journey from his Ann Arbor appearances at the Ark's "open mike," further still from the "passable imitation of Joan Baez" with which he regaled New Jersey coffee house regulars in a brief career as a boy soprano.



Fred Small, lawyer turned minstrel.

A Phi Beta Kappa graduate of Yale, Small grew up with the activism to which the topical song revival of the sixties gave voice.

"I was 12," he recalled, "when I heard Phil Ochs sing 'I Ain't Marching Anymore.' It had a powerful effect on my thinking."

Eager to fight the good fight for social justice, Small decided on a career in law. Concerned in particular about the environment—"I didn't consider John Denver an adequate spokesperson for environmental issues"—he worked as a research assistant to Professor of Law Joseph Sax, spent summers as an intern in environmental law offices, and further armed himself for environmental battle by completing a U-M master's degree in Resources, Policy, and Management.

After graduating, Small worked at the Environmental Defense Fund in Denver before joining the Conservation Law Foundation. The seeds of a career change had been blowin' in the wind for some time, however. They were planted, Small recounted, by Dean Terrance Sandalow.

The occasion was the first annual Law Revue, which Small won with a ballad he composed and sang. "Afterward," he remembered, "the dean approached me and said, 'I have only one question for you: Why do you want to be a lawyer?' It made me ask myself the same question."

The question resounded as Small led growing crowds in song at the antinuclear rallies that followed the accident at Three Mile Island. Small was hooked. "There's nothing like getting 100,000 people singing along with you," he said. "It's intoxicating."

It is also something that Small, by all accounts, is exceedingly good at, a skill he deems critical to making music in the public interest. "In our professionalized society," he explained, "people assume they can't do anything they're not licensed to do. [Group singing] is very democratic, and I like that. Ordinary people derive strength from hearing themselves make a beautiful collective noise. People feel powerful singing together; it's a magical experience. There has never been a successful social change movement without a culture to sustain it. Try to imagine the civil rights movement without 'We Shall Overcome.' "

Legal subjects—Title IX, the Reserve Mining case, Karen Silkwood—find their way into Small's topical songs, which he brands as "politically subversive in the best sense." But Small does not deliver courtroom oratory or singing briefs.

"There's a big difference between a pamphlet and a song," he commented. "Songwriters who don't understand that are doomed to futility. To be persuasive, a song must tell a story." If it can tell that story with humor or stir people's memories, so much the better.

Dig a Hole in the Ground
or
How to Prosper During the Coming Nuclear War

by Fred Small

You hear so many rumors, sometimes you get confused
But I read it in Time Magazine and I saw it on the news
We'll see dramatic changes in the lifestyle we enjoy
If those megatons of atom bombs are actually employed

The scenarios are scary, oh, but they don't worry me
Since I received a pamphlet from a federal agency
It's got diagrams and checklists and I read it front to back
And it told me what to do in case of nuclear attack: Just

CHORUS:
Dig a hole in the ground, climb right on down
Lay some boards on top of you and sprinkle dirt around
You won't have to be dead if you only plan ahead
You'll be glad you kept a shovel on hand!

Now you can't just go picking any old place to dig your hole
Got to take a ride to the countryside to the town where you are told
If your plates are odd-numbered please don't panic, you'll be fine
Just politely let those even-numbered cars go first in line

If you don't have a car, just hail a cab or ride your bike
You can climb aboard the Amtrak train, sit back, enjoy the sights
You and thousands of your city friends will be welcomed cordially
By townfolk who will show you country hospitality—then

CHORUS

We're sure to give you notice up to seven days before
But it's wise to recognize the warning signs of nuclear war
If the temperature is rising in a flash of blinding light
Grab your toothbrush and a flashlight and shut the windows tight

If the wind is blowing wicked and there's buildings in the air
Blisters on your body, fire in your hair
If the tupperware is melting and your dinner plans are wrecked
Stay calm, it's time to put this foolproof plan into effect: Just

CHORUS

The desire to serve the public interest that motivated Small's legal career also fuels his music—his medium has changed, but not his message. But Small's life is dramatically different now. At the Conservation Law Foundation, he earned just under $20,000 a year, a sum that sustained him with money to spare. "Now," he said, "if I go out to lunch I don't mind letting someone else pick up the check." Although his gross income is fairly significant, so are his expenses. He described his current net income as "just above the poverty level."

Small has also had to adjust to the emotional rhythms of the artist's life. "One day you get a standing ovation and two encores," he observed, "and the next day you're playing to students in a commons and there's not a whole lot of energy. Or worse yet, you're not performing for three weeks. You forget why you're in the business. As a lawyer, things are well laid out; you know what you're supposed to do. And you don't get your jollies from whether the judge liked your argument; you get it from the daily intellectual challenge."

Had Small anticipated a musical career, he probably would not have attended law school. But in a sense, it was law school that made his musical career possible. "I had to prove myself in a conventional field before I could risk myself in an unconventional one," he admitted. Nor has the assertiveness he learned in law school gone unused. He compares being a freelance musician to "applying for a job every time you pick up the phone. It takes a lot of self-confidence and a lot of determination."

That determination is paying off for Small. His parents have adjusted to having a son who's a folksinger, the transition smoothed, no doubt, by the tender songs he writes about them and by the oath he swore to his mother never to let his health insurance lapse.

When Small left the law, his father worried that he could never "get back on the escalator" if he wanted—or needed—to. Small's response was that he never viewed law as an escalator, that he simply wanted a rewarding life. "If I want to go back to law," he said, "all I need to do is dry clean my suit and retype my résumé."

For now, however, Small is content to serve the public interest through song. The words he speaks read like the lyrics of one of his songs:

I didn't know what to expect, so
I'm not disappointed.
I've survived.
I feel like I'm turning a corner.

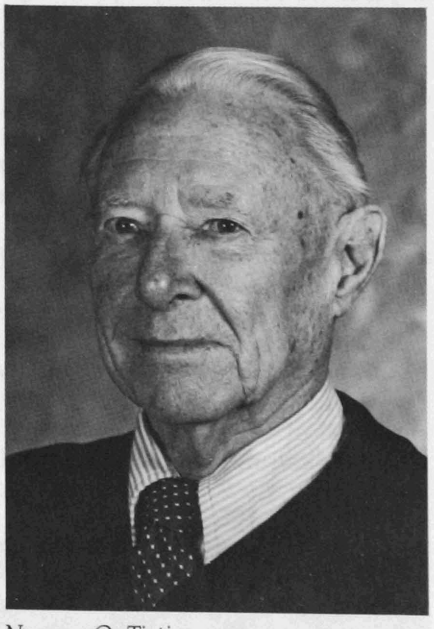
In memoriam

The Honorable Norman O. Tietjens, judge of the United States Tax Court, died in September, 1983. Judge Tietjens, who received his J.D. from the Law School in 1930, served on the Tax Court for 33 years, six of which were spent as chief judge.

Judge Tietjens received his undergraduate degree, as well as a master's degree, from Brown University. After graduating first in his class from the Law School, he practiced law for several years in his native Ohio. Before his 1950 appointment to the Tax Court, he served as special counsel to the Federal Emergency Administration of Public Works, as counsel to the U.S. Maritime Commission, and as assistant general counsel in the U.S. Treasury Department.

Douglas Kahn, the Paul G. Kauper Professor of Law and a leading authority on taxation, praised Judge Tietjens as "an outstanding member of the tax bar and of the Tax Court. His opinions were incisive and demonstrated an exceptionally sophisticated grasp of tax law. His leadership of the court during his six years as chief judge was exemplary."

Many Michigan law students were fortunate to have heard guest lectures by Judge Tietjens; a number of Michigan graduates were privileged to have clerked for him. The Law School mourns his passing.



Norman O. Tietjens

WHAT IS LAW? *who cares?*

by philip soper

To say precisely when legal theory reached its current dead end would be more difficult and less to the point than describing the nature of the impasse and its causes.

By "legal theory" I mean that body of speculative thought about the nature of law that has dominated analytical jurisprudence since John Austin's lectures on the subject a century-and-a-half ago.[1] By "dead" I mean what the term suggests in ordinary speech: lifeless, drained of connections to any of the purposes that give meaning to human life. Dead "end" I suggest, rather than dead *simpliciter* because, unlike others who mock the sterility of these disputes,[2] I do not believe that the basic enterprise is misconceived so much as misdirected. Legal theory has taken a turn that can only end in an increasing divergence between the phenomena it analyzes and the actual experience of ordinary citizens.

The Problem of Motivation

Those inclined to doubt these claims or to suspect that they are exaggerated should consider what could possibly motivate an intelligent person to explore the "maze of metaphysical literature"[3] on the question, What is law? The uninitiated can be forgiven for assuming that the answer to this question is the obvious one: surely the persons most likely to profit from such a study are professionals or citizens forced by career or circumstance to investigate legal relationships—to find out, in short, just what the law is. In fact these people—judges, lawyers, law teachers, potential litigants, all "insiders" of the legal system, as I shall call them—are the least likely beneficiaries of legal theory. Countless judicial opinions line the shelves of countless professional libraries mutely attesting to the irrelevance of legal theory by their utter disregard for this body of scholarship. To maintain in the face of such evidence that academic speculation about the nature of law has anything at all to do with the practical problem of finding out what the law is can be done comfortably only by those so used to the smell of the lamp that they no longer notice it.

This charge of insider irrelevance rests on more than the evidence of empirical observation. Legal theorists virtually ensure the irrelevance of their results for this class of people by making insider opinions about what law is determinative of the truth of their theoretical claims. In this respect the legal theorist is like the scientist whose theories, say about animal behavior, cannot themselves be a part of animal experience. If bees and apes fail to conform to theory, it is theory that must change to keep pace. The possibility of animals' consulting theory for its behavioral implications is ruled out, not just empirically on grounds of inadequate consciousness, but logically on grounds of absurdity. So too, when the legal theorist tests claims about the nature of law by whether they mirror the opinions of litigants, judges, or professionals, insider irrelevance must result. The old saw, "Law is what the judges say it is," has been replaced by a new one, "Law is whatever insiders say it is." In neither case is the definition of any use to the insider.

Who else then asks, What is law? and what else might such a person be seeking if not information about existing legal relationships? Given the fact of insider irrelevance, it is natural to assume that the person to whom legal theory is addressed must be an

outsider of some sort. Indeed, much of the speculative writing about law, where it displays awareness of the motivation problem at all, seems to be based on the assumption that the critical viewpoint for conducting and evaluating the analysis is that of the external observer. But what kind of observer, and what does he or she want to know? What, precisely, is the point of marking off the distinguishing features of legal systems and separating them from other forms of social control such as moral systems or coercive regimes?

It would be one thing if, say, anthropologists turned to legal theory for help in deciding whether or not to classify a social structure as "legal." But by and large they do not and for good reason. Once the major features of various societies have been described and compared, it is difficult to see what further information is conveyed by adding the label "legal" to some and not to others. The label, like all classifications, lumps together common characteristics; but the question why just these characteristics should be selected as the referent for the word "law" is not an anthropological one.

Much the same conclusion holds for other outside observers who might be suggested as the intended beneficiaries of legal theory. Social psychologists describe and compare legal, moral, and coercive influences on behavior without recourse to legal theory to check the accuracy of their labels. Sociologists record and predict behavioral responses to variations in the law without first consulting legal theory to ascertain what law is. Policy scientists identify the legal impediments to needed change, distinguishing these from the cruder barriers of desire and will, without prior recourse to definitions of law and power. Outsiders, in short, resemble insiders in at least this respect: both make distinctions between law, morality, and force commonly and daily, but at levels and for purposes that have nothing to do with the apparent purposes and level of abstraction of legal theory.

This observation suggests that the problem of explaining the point of legal theory is but one aspect of the broader problem of explaining what underlies and motivates classification and definition in general. For most people, it will seem obvious that the way in which we divide the world and categorize its contents depends on our needs. We distinguish chairs from couches because the functions of each in human life are sufficiently different in contexts sufficiently often encountered to justify two categories rather than one. Most people have one concept for snow. But skiers know corn snow and powder, and Eskimos have distinct concepts for even more forms of solid precipitation. Indeed, languages are natural in part just because they permit this kind of modification: new experiences justify breaking an existing concept into several new concepts, each distinguished from the other by differences previously neglected but now worth taking into account.

All of this is familiar enough if not entirely uncontroversial. But recounting the familiar helps explain why it is so hard to discover who might be interested in what legal theorists have to say. The problem is not that social scientists, judges, lawyers, and citizens have no need for the distinctions between law, morality, and coercion that lie at the heart of legal theory. The problem, rather, is that they seem to have no need for the fine tuning that legal theorists add to the grosser discriminations that are more than satisfactory for ordinary people and for other disciplines. The citizen's main concern is to know the probable consequences of past or contemplated action. For that it is enough to know that law is, roughly, a set of directives issued or accepted by officials who have the power to back the directives with organized sanctions. Morality, in contrast, substitutes for the official source and the organized sanction an appeal to conscience to consider the impact of action on others. In contrast to both of these, an order backed only by a threat is neither part of an organized system of sanctions nor the subject of a claim of legitimacy, but depends for its efficacy entirely on the perceived likelihood and severity of the threat. These rough definitions are enough for most people in the same way that a broad, undifferentiated concept of snow is enough for the farmer whose only concern is the possibility of a late frost.

One may, of course, pick at the rough definitions in a variety of ways. One may try to show, for example, by emphasizing the similarities in the motivating sanction of each, that what is at first taken to be three distinct phenomena is in fact but one. Conversely, one could explain to the farmer why the skier finds useful a more finely tuned definition of snow. But who is the analogue to the skier in legal theory? Whose purposes are served by the more careful distinctions drawn by the analytic philosopher between law, morality, and force?

If we continue to press for an answer to this question by observing what legal theorists themselves profess as their goal, two final possibilities emerge. The first denies what we have assumed: that citizens and other insiders *can* operate adequately within their own areas of concern armed only with the rough definition of law. But this denial takes us back to where we started—to the plain fact that theories of law are simply not among the tools insiders use to help predict the consequences of action. At some point, to insist that philosophical analysis will yield sounder conclusions about what the law is when

such conclusions are reached repeatedly without reference to such analysis is to impose the philosopher's own goals on those he purports to aid, thus redefining the problem.

This allusion to the unique goals of the philosopher, however, suggests a second possibility. The effort to mark off the distinguishing features of legal systems may be thought to be a task worth pursuing for its own sake, without regard to the practical implications for other human endeavors. "Knowledge for its own sake" has a reassuring ring, particularly to academic ears, and boasts a renowned lineage in both humanistic and scientific fields. Indeed, much of the analysis that has dominated moral philosophy for the better part of this century seems predicated less on the assumption that it will actually aid in the making of practical moral judgments than on the assumption that philosophical clarity is desirable for its own sake. To be sure, a connection between conceptual clarity and better judgments is often invoked. But the connection is difficult to demonstrate, and, in any event, it seems clear that the analysis would proceed and be thought worthwhile regardless of its demonstrated practical value.

As a solution to the motivational problem in legal theory, however, this justification is remarkably uninspiring. For one thing, it wrongly analogizes social phenomena to the phenomena of the natural sciences. The idea of pure research directed at discovering, for example, the nature of the atom, makes some sense regardless of one's views about whether such knowledge will ever have practical consequences. By "makes sense" I mean both that such investigations are possible and that the impulse behind them is psychologically plausible. Objects can be described and differences and similarities noted without ever stopping to consider what purposes might justify marking off just these distinctions. The motivation for such disinterested analysis—exploration of one's environment for its own sake—is, moreover, from crib to lab, a familiar part of experience. In contrast, it is difficult to defend both the possibility and the plausibility of maintaining a disinterested attitude toward the investigation of social phenomena. The possibility is problematic because social phenomena and correlated concepts may themselves be affected by the theorist's analysis. If law is unmasked as force, attitudes toward law may change and previously perceived distinctions between tax collectors and muggers may blur. The theorist who ignores these potential consequences does so at the risk of discovering that yesterday's theory no longer explains today's data.

Even assuming one could control for the interaction between theory and data, it is hard to understand why anyone would undertake such a disinterested dissection in the first place. Unlike the physical universe, social reality consists of the internal attitudes of people as well as their observable behavior. The motivation for studying just the behavior, while deliberately ignoring the underlying attitudes—the hopes, fears, dreams, and desires that determine behavior—is comparable to the impulse that leads one to do crossword puzzles and brain teasers. The latter activities *are* typically pursued simply for the inherent enjoyment of discovering or manipulating logical or preconstructed relationships. They are psychologically plausible largely because they make no pretense of being relevant or meaningful beyond the context of the game itself. If the motivation for legal theory is analysis for its own sake in this sense, it should come as no surprise that the enterprise lacks relevance for ordinary purposes and appears to many to be a professional philosopher's pastime.

Instead of trying to infer the purpose of legal theory from the existing literature on the subject, it may be more profitable to ask directly what purpose legal theory *ought* or *could* be made to serve. What reasons, beyond the interest in conceptual analysis for its own sake, could motivate serious inquiry into the nature of law? Providing an answer to that question is as simple as attempting to infer it from the existing literature is difficult. Legal theory is a branch of philosophy, and the central questions of philosophy, from Plato to Kant, have never changed. What can I know? What ought I to do? and What may I hope? remain the cognitive core of every serious attempt to confront the human condition. If legal theory were viewed as an attempt to answer the second of these questions—What is law that I should obey it?—the motivational problem would be solved: The inquiry into the nature of law would be connected to a persistent human concern. Moreover, by viewing legal theory as a branch of moral philosophy, one can explain the nature of the wrong turn that has been taken in this field of jurisprudence. The problem is not, as some would have it, that legal theorists are guilty of "essentialism"—of assuming that law is somehow "out there" with a unique essence waiting to be described. (Law *is* "out there"; and it can be described.) The problem, rather, is that legal theory appears bent on a description whose point is primarily epistemological rather than moral. It is not the question of what to do, but of what one can know that has come to dominate analytical jurisprudence, even though the answers legal theory provides to this epistemological question are poorly designed to aid those who might be thought to be most interested in it—anthropologists, say, or lawyers, judges, and litigants. It is as if one had decided at a watchmaker's

What is law? Philip Soper advances the idea of two distinct, competing visions. His metaphor for the definitional task is not that of the blind men and the elephant but that of the drawings one can view as either a duck or a rabbit, a young girl or an old crone, stairs rising or descending — the symbol capable of totally different interpretations irreconcilable by so simple an act as walking around the beast.

convention to deliver a discourse on the question, "What is time?" when all that could conceivably interest those in attendance would be the problem of how to measure time more accurately.

Legal and Political Theory

Nothing better illustrates just how curious a state of affairs has been reached in this field of philosophy than the gulf that currently separates political and legal theory. The central question of political theory is that of legitimacy: Why should I, or anyone, obey the state? Political theorists thus confront directly what I have identified as the moral question that ought to guide legal theorists as well. Indeed, classical philosophy did not distinguish these as separate disciplines. Thrasymachus' challenge to distinguish might from right is as much a preface to every serious contemporary investigation into the nature of law as it is to Plato's *Republic*. But in Plato's case the preface is to a far more exciting and elaborate story than the tale typically told by modern legal theorists. The latter turn the challenge into a request to dispel linguistic confusion; Plato accepts it as requiring an investigation into the nature and basis of the just state, which necessitates in turn a wide-ranging inquiry into the substantive issues of moral and political philosophy.

This difference in approach reflects more than a difference in storytelling tastes; it reflects as well a difference of view about the connection between the questions of political and legal theory. That such a connection exists should hardly surprise. The political theorist's goal of characterizing the just state seems to require the cooperation of the legal theorist in two ways, thus solving the motivational problem. First, in order to know what constitutes a good legal system, one must already know, it seems, what a legal system

is. From this perspective, legal and political theory, though separate, are related in the sense that an adequate legal theory is a logical prerequisite for an adequate political theory. Second, by viewing legal theory as a first step toward an adequate political theory, the analysis of the concept of law itself is guided by the problem of political obligation that motivates it: the central question for the legal theorist, for example, will be whether or not we might just mean by "legal system" those organized social systems that have some legitimate moral claim on us.

Contrast now the reality reflected in the current relationship between political and legal theory. Two events in the last two decades led to a resurgence of interest in both fields. In legal theory, H.L.A. Hart's *The Concept of Law* revived debates about the nature of law and furnished the foil then, as it continues to now, for those who challenge the positivist view that Hart endorsed. In political theory a non-literary event, the experience in the United States of an unpopular war, revived professional philosophical interest in the question of political obligation, spawning innumerable articles on the nature and basis of the obligation to obey the law. Despite the classical and apparently logical connection between these two fields, the briefest glance shows that each is oblivious of the other.

Consider first the political theorist's discussion of the obligation to obey the law. Most such discussions typically proceed without the slightest hint that one first needs to know what law is in order to decide whether there is an obligation to obey it. In contrast, a good deal of legal theory has its origins in, and continues to be preoccupied with, the problem of explaining whether and how law differs from force. Explaining what is wrong with the view of law as force is not an easy task. But current analyses of political obligation ignore the problem altogether. If law is only force, as Austin claimed, one does not need pages of discussion about the nature and extent of the obligation to comply: there is none. The analysis could end as quickly as Hart dismisses Austin's model of law as the "gunman situation writ large."[4] The political theorist, in short, who sets out to determine whether there is an obligation to obey the law without first examining what is meant by "law," risks the charge that his political theory is either incomplete or trivial. It is incomplete if it depends critically on a preconceived idea of law that is not defended; it is trivial if that idea about what law is already entails the conclusion with respect to the obligation to obey.

The situation with respect to legal theory is no better; indeed it is the mirror image of the problem in political theory. Where political theory ignores the need to define law in a way that does not trivialize further investigation into the grounds for obligation, legal theory ignores the phenomenon of political obligation in the account it provides of a legal system. The best way to illustrate this particular claim is to consider developments in legal theory since the appearance of *The Concept of Law*, which at first glance appears to be a counter-example to the claim. Hart begins his investigation with the problem of accounting for obligation as the key to his criticism of Austin. But from that beginning, the investigation shifts increasingly toward what I have called the epistemological inquiry: the focus is on the kind of entities (rules) that make up law and the ways in which varieties of these rules combine to yield a legal system. In the end it is this quest for a descriptive model of legal systems that dominates the analysis. The original and critical question, of how rules accepted and enforced by officials can be said to be rules of obligation, is largely ignored.

Etiology and Prognosis

What explains the preoccupation with the epistemological questions? What caused the classically conceived unitary inquiry to dissolve into separate inquiries, each apparently blind to the other?

Part of the answer, no doubt, lies in the nature of analytic philosophy itself, which increasingly in this century has taken its task to be the presumably value-free one of dissecting language to reveal meaning and to correct mistaken ways of thinking and talking. One need not disparage this enterprise to note the risk it entails of producing puzzles that are puzzles only for philosophers, not for ordinary people. One can push at the boundaries on the map created by language at almost any point and discover how easily the lines blur. But most people do not push. When they do, it is in response to new problems, sufficiently unusual to make old categories become suddenly less useful.

In science these concept frontiers are crossed continually, but by an ever smaller group of experts. In ethics the opposite is the case: everybody is an expert (which means nobody is) and at the same time, the moral categories and concepts one uses in making practical judgments differ little from those in use in classical Greece. There is simply no analogue in moral philosophy to the proliferation of concepts in, say, particle physics. The consequence is a powerful incentive to accommodate philosophy to the scientific model; to turn what should be moral inquiries, where progress is difficult, into scientific inquiries, where progress, at least in the form of new classifications and distinctions, is possible. Unfortu-

nately, to stake claims to moral progress on this analogy to science comes at the cost of any conceivable relevance for human affairs.

Current legal theory is preoccupied with linguistic distinctions and difficult cases. Whether law is properly characterized as "a rule, a principle, a norm, or a command" and "how to find the law in a hard case" are two examples of the kinds of questions it seeks to answer. My suggested focus in investigating the nature of law is, instead, the easy case, the simple directives of an organized society that citizens confront, for example, every time they stop to think about the speed limit sign they are passing. What must be true about such directives—law in the simple sense—if they are to yield obligation?

Such a focus, admittedly, seems open to the charge that one is no longer doing legal theory at all, but only political or moral theory. Thus, if one shows that humans, in order to fly, would have to have wings and a different bone structure, one proves only that the creature described is not what we mean by "human." So too, after completing an analysis of law that preserves a place for fidelity, how does one respond to the outright dismissal of the analysis on the ground that that's just not what we mean by law?

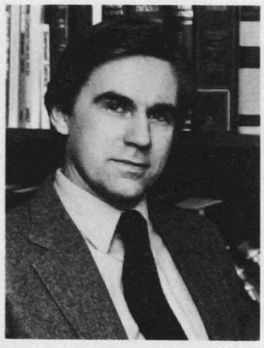
In part I have already answered this question. Others, Hart for example, also take as a starting point the idea that an adequate concept of law must at least connote obligation. The redirection that I propose simply goes one step further: What better way, after all, to show that law connotes obligation than to show that it obligates in fact? In that sense, by insisting that actual obligation is one of the phenomena of legal systems for which theory must account, one is no less arbitrary in the selection of data to be explained than are those who focus only on that other entity, the legal directive.

In the end, however, one may have to concede the possibility that political obligation and legal obligation are entirely unrelated—sharing a name (obligation) but not a common moral meaning. My choice of metaphor for the definitional task I propose is not that of the blind men and the elephant but that of the drawings that can be seen as either a duck or a rabbit, a young girl or an old crone, stairs rising or stairs descending—the symbol capable of totally different interpretations that cannot be reconciled by so simple an act as walking around the beast. These alternative interpretations, though in one sense irreconcilable, are not, however, completely arbitrary; they are obviously bounded by the objective reality of the phenomenon. The duck-rabbit cannot plausibly be seen as a female nude except on the psychiatrist's couch. Something like a creative, self-fulfilling choice must determine which of the objectively plausible views one takes.

As things currently stand, the only vision to be found in contemporary legal theory is one that cannot, except by fiat, distinguish law from force. What is needed is an investigation that shows how it is possible to see law as more than this, without also simply declaring by fiat that law and morality coincide. Such an investigation requires reestablishing the link between political and legal theory, constructing in the process *a* theory of law (emphasis, but not too much, on the indefinite article). Estimating the chances of success in such an undertaking is probably best done at this stage by keeping in mind another observation: "Most philosophical ideas are simple enough. . . . The difficulty . . . comes when the philosophers attempt to prove they are right."[5] ⚄

Footnotes

1. See John Austin, *The Province of Jurisprudence Determined* (London: J. Murray, 1832).
2. See, e.g., Glanville Williams, "The Controversy Concerning the Word 'Law,' " in *Philosophy, Politics, and Society*, 1st ser., ed. (Oxford: Oxford University Press, 1967), p. 134. See also Judith Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964).
3. Thurman Arnold, *The Symbols of Government* (New Haven: Yale University Press, 1935), p. 216.
4. H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), p. 7.
5. Morse Peckham, *Beyond the Tragic Vision* (New York: George Braziller, 1962), p. 148.



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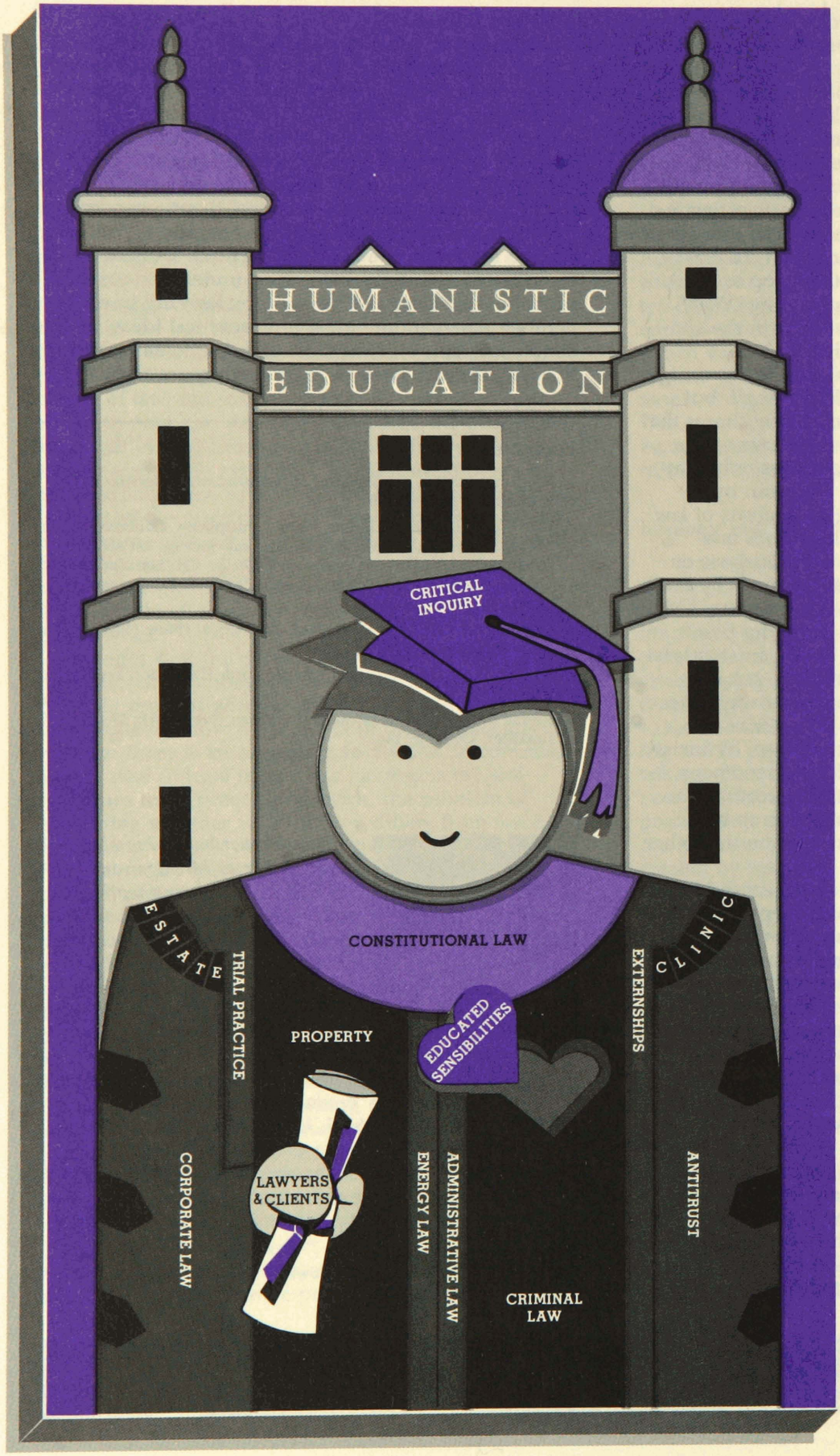


The Moral Responsibility of Law Schools

by Terrance Sandalow

Editor's note: This article is an abridged version of the address Dean Sandalow delivered at the plenary session of the 1984 annual meeting of the Association of American Law Schools. The full text appears in the June issue of the Journal of Legal Education.

The subject I have been asked to address, the moral responsibility of law schools, is perplexing, less because answers to the implicit question are uncertain than because the meaning of the question itself is unclear. Our ideas about moral responsibility have been formed in reference to individuals. They presuppose the existence of distinctively human characteristics such as understanding or will. What, then, can be meant by the moral responsibility of "law schools," institutions that, just because they are not human, necessarily lack these capacities?

The attribution of moral responsibility to law schools can best be understood metaphorically, as a device for drawing attention to moral issues that arise in the operation of the schools. Despite the contrary assumption of some contemporary critics of legal education, the existence of such issues is not a recent discovery. Still, each generation must find its own way to and through the moral issues it confronts, and in ours the metaphor of institutional moral responsibility is for many an especially attractive path. It is worth inquiring briefly why that should be so.

It is a commonplace that we live in an age of large organizations, an age in which the pursuit of our goals requires collective action. Automobiles cannot be built, nor the next generation educated, by individuals acting alone or in small groups. Many of the problems that beset us—the threat of war, poverty and pollution, a malfunctioning legal system—cannot be fully understood, let alone addressed, except by the concerted efforts of many people. And so, large organizations are established to act on our behalf.

It is an increasingly common perception, however, that those organizations are themselves the source of many contemporary problems. These latter problems do not exist because any individual has willed them into existence, but because many individuals have acted subject to the pressures and with the limited perspectives and authority incident to their institutional positions. Each may thus contribute to bringing about results that all regard as undesirable. In these circumstances, the appeal of the metaphor of institutional responsibility is evident. It asserts the importance of an institutional capacity to identify and address the moral issues that confront institutions.

The scale at which legal education is conducted would not lead one to anticipate that it would face similar difficulties, but the metaphor has proved to be attractive even there. A principal reason is that, despite their modest size, law schools have in recent years revealed an inadequate capacity to address issues that are central to their existence.

The most important of these issues concern the schools' educational programs. Roger Cramton, among others, has drawn attention to the disarray of what is still, though now euphemistically, called the curriculum. The state of the curriculum is, however, only symptomatic of a larger failure, the seeming inability of law schools to address fundamental issues concerning the goals of legal education.

The assertion that schools are not addressing those issues requires a word of explanation, since it is undoubtedly true that more, and more intelligent, writing about legal education has been published during the past fifteen years than during the previous one hundred. It would be difficult to maintain, however, that this outpouring of books and articles has led to the adoption of educational programs that embody a coherent vision of the purposes of legal education. The considerable amount of curricular innovation during the period suggests only that law schools are prepared to accept, willy-nilly, whatever new ideas may be advanced about the educational needs of students.

Are there lawyers or judges or students who argue that fledgling lawyers should know how to try a case? If so, open a clinic or establish a trial advocacy course to develop the necessary skills. Are there others who believe that lawyers require greater familiarity with alternative methods of dispute resolution? Then start a course in negotiation or in arbitration or perhaps in both. Are there still others who think that lawyers require an understanding of economics or sociology or political philosophy? They too can be accommodated. Of course, we have still not provided for the young man or woman who cares deeply about children's rights and cannot find within the law school a faculty member who shares the interest or sufficient courses to permit study of the subject in depth. Happily, this need too can be met: authorize a semester of credit for an externship at the Children's Defense Fund.

Each of these curricular innovations doubtless offers students opportunities for useful learning, but they do not demonstrate that law schools are addressing fundamental issues regarding the objectives of legal education. The ease with which we have accommodated so many disparate pressures bespeaks, rather, a failure to attend to questions about the objectives of legal education and to confront the hard choices that are required in allocating our scarcest resources, the time, energy, and attention of students.

Although responsibility for the educational program rests with the faculty, it would be simplistic to conclude that its failings are simply the faculty's fault. They are, rather, the product of a number of cultural and societal trends whose effects extend well beyond legal education. I want to draw attention to one that has particular relevance to the issues underlying the metaphor of institutional responsibility.

Sociologists of academic life have described the transfer of faculty members' attention and allegiance, from their schools to their scholarly disciplines, that occurred in the decades following World War II. Within law schools, the transfer is at least partially responsible for a number of happy consequences, including a significant increase in the range and power of legal scholarship. But it has also contributed to a decline in the attention given to issues that must

be addressed at the level of the school, primarily issues regarding each school's educational program.

The problem is not, as is commonly supposed by those outside the university, that increased attention to scholarship has made the faculty less conscientious teachers. It is, rather, that the concentration of faculty members upon their fields of specialization *has* influenced their understanding of the objectives of legal education and diverted their attention from issues that must be addressed collectively. The overlapping and lack of coordination among courses, the absence of requirements beyond the first year, and the steady increase in the number of hours allocated to the specialized courses typically offered in the second and third years are predictable characteristics of a curriculum the content of which is determined by faculties whose members, however conscientious they may be as teachers, are primarily engaged in their scholarly specialties.

The effects of specialization go deeper, however. Faculty members concerned primarily with their scholarly specialties are likely to direct their courses toward enhancing student understanding of those specialties rather than concerning themselves with the broader objectives of legal education and with the contributions that their courses might make to the achievement of those objectives.

A legal education thus comes to be understood as the completion of some number of courses that happen to be taught at a law school. Whatever can plausibly be asserted to have some relationship to the study or practice of law has a place, but except in the occasional debates over the courses to be required in the first year, each element of the "program" is considered on its own terms. Such a "program" undoubtedly offers students much that is of value, and there is every reason to believe that students benefit from it. It nevertheless lacks a guiding purpose; it lacks, that is, a necessary element of any moral undertaking.

As a complete description of legal education, this is no doubt too stark, but not, I fear, very much so. Legal education's winter of discontent, as my colleague Francis Allen has described the malaise of the past fifteen years, is a reality with which we are all familiar; it has, after all, even been noticed by the *New York Times*. The source of that malaise is a failure of purpose, and our discomfiture is not likely to end until we have succeeded in reestablishing a sense of purpose, and therefore a moral foundation, for the enterprise in which we are engaged.

The recovery of purpose will require that we open for discussion issues that have been neglected for too long. Central among these is the question of how students are to be regarded. I can make the point best by considering the underlying attitudes toward students revealed in three recent proposals for reforming legal education, proposals that I have selected not because they are unique but because of the very considerable attention each has received.

In a series of articles and speeches during the past decade, Chief Justice Warren Burger has been harshly critical of the quality of advocacy in the nation's trial courts. The deficiencies of the trial bar, he has argued, contribute to court congestion, the high cost of litigation, and a failure to protect adequately the interests of clients. Among the remedies the Chief Justice has recommended is a reorientation of legal education designed to improve the competence of trial lawyers.

Students ought not to be regarded merely as instruments, however; not even in the setting of a professional school. They are, in Kant's familiar formulation, "ends in themselves and sources of value in their own right."

Harvard's President Derek Bok has advanced a more comprehensive set of criticisms, aimed less at the profession—though it does not escape his censure—than at the legal system. Among the criticisms he advances are an overreliance upon litigation to resolve disputes and the failure to develop effective, less costly means than now exist to vindicate legal rights, especially for people of moderate means. Bok also looks to legal education as a partial remedy for the ills he perceives. "If law schools are to do their share in attacking the basic problems of our legal system," he maintains, "they will need to adapt their teaching. . . ." He advocates devoting a larger part of the curriculum to the methods of mediation and negotiation, and "drawing upon the services of second- and third-year law students" to help "create new institutions more efficient than traditional law firms in delivering legal services to the poor and middle class."

Duncan Kennedy has bigger fish to fry. His criticisms are not directed merely at the profession or the legal system, but at the entire social order in which they are embedded. In a measured, one might say a subtle and nuanced, assessment, he opines that "our society is rotten through and through. . . ." His proposals for reforming legal education are cast accordingly; though they are too complex to describe in detail, I think Professor Kennedy would not object to my characterizing them as aimed at creating the intellectual vanguard of a movement to dismantle the existing social system, in the hope, though not necessarily with the expectation, that something better

would follow. For reasons that he does not elaborate, Kennedy regards these proposals as appropriate for implementation only at a "relatively large, elite law school, operating as part of a private university."

My purpose in reminding you of these proposals for reforming legal education is to draw attention to a premise that is common to all three. So far as one can judge from what they have written, each of the critics begins with the assumption that legal education should aim at fitting law students to the professional roles that the latter will, or that it is thought they should, play upon graduation. On that premise students are but instruments of the society—or, for Professor Kennedy, perhaps missiles to be hurled against it. Vocationalism is so pervasive in American education that many will regard the premise as unexceptionable, especially in the setting of a professional school.

Students ought not to be regarded merely as instruments, however; not even in the setting of a professional school. They are, in Kant's familiar formulation, "ends in themselves and sources of value in their own right." The notion that a legal education is merely instrumental, that its aim is merely to equip students to fulfill the professional obligations that they will eventually undertake, rests upon a confusion of thought. It does not follow from the fact that our students will shortly undertake professional obligations of service that we are entitled to treat them as instruments. Their status as persons, as sources of value rather than merely a means by which value is attained, is diminished if we abstract from them the roles they later will play in relation to others, seeking only to equip them for those roles. Appropriate respect for them as persons requires that we take as the main object of legal education the enhancement of their capacity to realize their human potential as that is understood in our culture.

If we are to treat our students as ends, whose education is important because of the contribution it can make to their lives, we need to ask what opportunities the study of law affords for developing capacities and knowledge that are valuable in their own right, not only in the eight or ten or twelve hours a day in which the students, upon graduation, will be serving in professional roles. As a way of giving content to this very general statement, I shall consider, briefly and illustratively, some goals at which a legal education so conceived might aim. In deference to the theme of this afternoon's program, I shall emphasize the moral dimensions of these goals, but it is useful to recognize that there are other ways in which they might be discussed.

At one time, there would have been widespread agreement that, as Herbert Spencer put it, "[e]ducation has for its object the formation of character." In the sense that Spencer employed it, the word "character" is not heard very often these days. So used, it has a musty quality that is less likely to inspire than to evoke a faint smile. The loss of meaning is regrettable, for the word captured an aggregation of qualities that are highly useful in sustaining a life.

A man or woman of character has a moral code, but he or she also has something more, the personal strengths that are necessary to steadfastness of purpose in the face of life's vicissitudes. Disappointment, embarrassment, boredom, fear, pain, and temptation are obstacles to the attainment of our goals. They are also part of the common experience of mankind. Courage, patience, perseverance, and other qualities that enable us to overcome these impediments are, for that reason, universally regarded as virtues, and since they are necessary to the success of any sustained moral undertaking, they have a special claim to our attention.

Inculcation of these virtues is a traditional aim of education, one that deserves greater emphasis than it has received in legal education. Law schools are not, to be sure, well positioned to play a decisive role in forming their students' characters. Students come to law school as adults. The deplorable faculty-student ratio at all law schools largely precludes a level of personal contact that might permit faculty members to become an important personal influence in the lives of their students. Still, the limited potential of legal education for influencing the development of character does not justify a conclusion that it is irrelevant to that development. As Joseph Schwab, professor of natural sciences and of education at the University of Chicago, has written, character traits like those we are considering are "enhanced only by undertaking and sustaining the actions pertaining to [them] to the point of perceiving and enjoying the enhanced competence which results." By availing ourselves of the opportunities that legal education affords for leading students to such actions, we can help to strengthen those traits. The opposite is also true. We can, by inappropriate behavior, help to weaken them.

In this perspective, there are reasons for concern about the moral as well as the intellectual consequences of current practices in legal education. Faculty acquiescence in the absence of students from class and in their failure to participate in class discussion, the willingness of faculty members to tolerate lack of preparation for class discussion and to accept unsatisfactory answers without adequate criticism, and failure to insist upon compliance with reasonable deadlines for the submission of written work represent missed opportunities to assist students in strengthening important moral qualities. Participation in a well-run class discussion, to take a central example, permits students to overcome fear and to learn by experience that the embarrassment of public error may be compensated by the learning that ensues. By encouraging students to risk the expression of novel ideas, it may help to develop courage. Faculty members who simply accept the failure to participate in class discussion or who accept intellectually sloppy

answers not only miss these opportunities, but act in a way that is likely to be destructive of the very qualities they should be concerned with strengthening. Students who are permitted to "pass" when called upon, whether they do so from unpreparedness or fear, are simply reinforced in these tendencies.

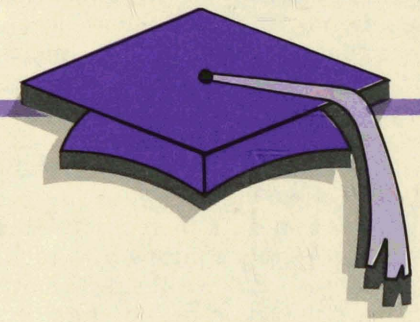
Since they have at times been justified as useful in developing character, I want to make clear that I am not calling for a return to the barbarities that (according to legend) so frequently marred law school classes in earlier generations and to which, I suspect, current practices are an overreaction. Ridicule and humiliation are not effective pedagogical techniques. An occasional student may meet their challenge, and may even be strengthened by doing so, but most will merely suffer, some to the point of diminishing the self-esteem that is necessary to purposeful activity.

The classroom practices I have mentioned are important for yet another reason. Among the opportunities that legal education affords for developing character are the occasions it provides for exemplary conduct by faculty members. The faculty member who, in response to a student answer that is wrong or foolish, demonstrates patience in working with the student toward a better answer teaches more than an intellectual lesson. So too does the faculty member who ridicules students or reveals a lack of concern for them by inattention to their performance in class. Ideas about patience, courage, and duty and about the ways in which men and women ought to treat one another take on meaning in our lives as we observe the behavior of those around us, especially those who occupy positions that might reasonably lead us to suppose that they are socially approved models for our own behavior.

A legal education that takes the development of students as its end will, obviously, also be concerned with the enhancement of their intellectual capacities. It is customary, and perhaps useful for some purposes, to distinguish between intellectual capacities and the moral virtues we have been considering, but it is important to recognize that the strengthening of intellectual capacity has a moral dimension. Moral action depends quite as much upon clarity of thought as upon purity of motive or strength of character.

The development of intellectual capacity has, of course, traditionally been regarded as an important, at times the most important, objective of legal education. It is the objective that is stressed by the familiar, if no longer very fashionable, statement that the aim of legal education is "to teach students to think like lawyers." Rightly understood, that ability is not merely a professional technique useful only in the office or courtroom, but a set of skills that is of pervasive importance in life. Among the skills it encompasses is, for example, the ability to read. The ability to capture meaning from the printed word and to understand the possibilities and uses of fixity, vagueness, ambiguity, and change in language is not simply a professional necessity. It is indispensable to participation in a community of thought that extends beyond very narrow boundaries of space and time. Similarly, the abilities to identify and articulate the premises of thought and to develop arguments that flow in an orderly fashion from those premises are not simply professional techniques, but capacities of mind that are essential to understanding the world around us and to undertaking purposeful activity within that world.

A traditional aim of education, from which legal education has no exemption, is to strengthen the capacity of students to avoid common hazards to clear thought.



The idea has arisen recently that the skills of "thinking like a lawyer," both those that I have mentioned and others, are easily acquired and that, having learned them in the first year, students might more profitably spend their subsequent years in law school learning something else. At least in part, the idea grows out of dissatisfaction with emphasis on the case method throughout law school. I hold no brief for the case method—indeed, I agree that it is overused—but the notion that the skills it seeks to impart can be learned "once and for all" in the first year reflects inadequate understanding of those skills, of the means by which they are developed, and of the uses of the case method. At some mechanical and elementary level, no doubt, an able student can reasonably quickly learn to comprehend an appellate opinion and the techniques by which other cases are distinguished from it. But the development of these skills is not, after all, the real aim of the case method. The abilities to read imaginatively and with attention to the subtleties of language, to frame and test suitable hypotheses for synthesis, and to detect premises of thought and errors of logic, all of which the case method is aimed at developing, are not capacities that we either have or do not have, in the way that one either does or does not possess a law school degree.

Capacities such as these are the product of continuous struggle to wrest meaning from disorder. Like the moral virtues considered earlier, they are developed and maintained only by continually undertaking and sustaining the activities pertaining to them.

The notion that the skills of critical inquiry, having been learned in the first year, can be set aside thereafter so that students may devote attention to other matters suffers from yet another vice, a failure to recognize the interdependence of these skills and of knowledge. Skill in reading and in analysis and synthesis is broadened and deepened as it comes into contact with new subject matter. Similarly, knowledge of a subject, except at a very superficial level, depends upon its having been acquired through the tools of critical inquiry. These considerations suggest that the real failing of legal education is not that it overemphasizes developing the skills of "thinking like a lawyer," but that it gives inadequate attention to the use of those skills in dealing with materials and issues that are not formally legal. The consequence of that inattention is the curious disjunction that too many lawyers display, careful craftsmanship in the performance of professional responsibilities and a lack of concern for the skills of craft in dealing with political and social issues. Increased attention to such issues, which are hardly irrelevant to the study of law, might lead students to an understanding that the skills of critical inquiry have uses that extend beyond the performance of professional tasks.

A good deal more might be said about these intellectual capacities and the role of legal education in developing them, but I want to turn to a number of other intellectual qualities with which law school should also be concerned. A traditional aim of education, from which legal education has no exemption, is to strengthen the capacity of students to avoid common hazards to clear thought. I have in mind such hazards as self-interest, provincialism of time and place, overdependence on familiar categories of thought, the inability to tolerate uncertainty, and sentimentality. The last of these may be used to illustrate the opportunities that legal education affords to overcoming these hazards.

In Henry Adams' roman à clef, *Democracy*, a powerful politician is made to complain that a sentimental young woman whom he is courting has judged his political behavior by abstract principles. The complaint is made cynically, but even as made it is a telling reproach to all those who suppose that abstractions and untutored sentiment can serve as an adequate guide to the conduct of human affairs. Adams' point is not that principles and feelings are irrelevant in guiding or judging conduct, but that both should be informed by a knowledge of life.

Since the case method has taken such a beating in recent years, it is worth saying that appellate opinions can serve as an especially useful vehicle for the education of sentiment as well as to teach the importance of approaching abstract principles skeptically. The latter point is too familiar to require elaboration, but many will greet the former with astonishment. Appellate opinions, it will be said, report only carefully selected facts, and even those are often stated in highly abstract fashion; they are, for that reason, implausible vehicles for conveying a sense of the variousness and complexity of life. But though it is true that the opinions are written in that way, it does not follow that they must be read in the same way. A skillful teacher will lead students to read opinions imaginatively, with attention to the human possibilities that lie beneath their abstract language. The exploration of these possibilities, conjoined with consideration of their implications for judgment, offers opportunity for developing that fusion of feeling and intellect we call sensibility.

Two points deserve emphasis. First, legal education can dull sensibility as well as enlarge it. A failure to devote class time to probing beneath the abstract language that judicial opinions typically, and statutes invariably, employ conveys to students the lesson that emotion and the complexities of life are irrelevant to law. And by leading students during a formative intellectual period to think only in abstract categories, it can dull both feeling and their sensitivity to complexity. But a second point needs also to be recognized. The appropriate objective is not the release of feeling, but its education. This requires, as I have already suggested, bringing feeling into contact with the full range of life's possibilities, but it also requires that it be brought into contact with those general ideas that we call knowledge. Raw feeling is transformed as it confronts the knowledge of economics or anthropology, the ideas of philosophy, or the accumulated wisdom of law. We ought not to regard that fact as a source of alarm, but as cause for celebration and as an opportunity for legal education.

It will not have escaped attention that I have as yet said nothing about the study of law. The qualities of mind and character I have been considering might as well be, and often have been, developed outside law schools. What then, it may be asked, distinguishes legal education from education elsewhere in the university? The answer, surely, is that law is the subject of study. Moral and intellectual capacities are enhanced only by engaging in activities that require their use. One cannot, for example, learn to think without thinking about something; students who attend law school enhance their capacity to think by thinking about law.

The study of law is not, however, merely a vehicle for developing moral and intellectual qualities. One studies law, presumably, to learn about law. An elaborate argument is hardly required, at least before this audience, to establish that knowledge of law is a valuable end in itself. Law is a central feature of the social, political, and economic order. It touches large areas of life directly, and in some respects may be said to affect all. The issues with which it deals, the ways in which it deals with them, and it should per-

haps be said explicitly, the issues with which it fails to deal are expressions of the ideas, values, and tensions that may be found within the society. Law thus offers, as Francis Allen recently put it, "a path to the world," and one studies it for the same reason that one studies anything else, to acquire knowledge of the world. That knowledge is both an end in itself and a condition for intelligent, purposeful, and therefore moral, action.

To see the study of law in this perspective is to put to rest any lingering questions, if any remain at this late date, about the appropriateness of bringing to bear upon it the knowledge and techniques of other disciplines. If our object is to enlarge students' understanding of law, both of its internal operations and of the ways that it does, should, or can influence our lives, we will necessarily seize upon whatever tools may help to achieve that object. If philosophy and literary theory shed light upon the uses and limits of language, as it is or might be employed in legal settings, we need to acquaint our students with them. So too, if economics generates plausible hypotheses with regard to the inner dynamics of law or the effects of vertical price fixing, learning about them is appropriately part of an education in law.

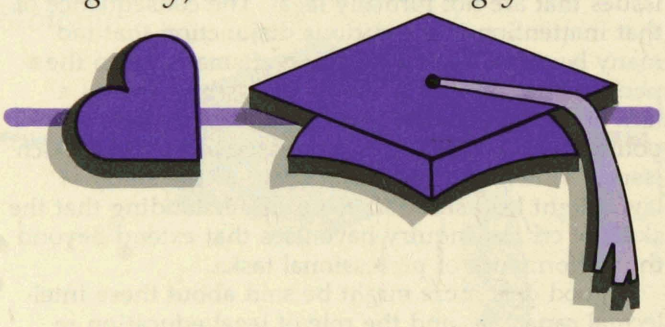
There is yet another reason to draw upon other disciplines in the study of law. We are all familiar with Burke's aphorism that "the study of law sharpens the mind by narrowing it." The same is true, as the modern university seems intent upon demonstrating, of every other discipline. As John Stuart Mill wrote more than a century ago,

> Experience proves that there is no one study or pursuit, which, practiced to the exclusion of all others, does not narrow and pervert the mind; breeding in it a class of prejudice special to that pursuit, besides a general prejudice, common to all narrow specialties, against large views, from an incapacity to take in and appreciate the grounds of them.

The obvious safeguard is to provide students with the perspectives of other disciplines, so that they may acquire an enlarged view of their field of specialty and of the world of which it is a part.

Many lawyers and law teachers will object to the goals that I have outlined on the ground that those goals are appropriate to a liberal education, but ignore the responsibility of law schools, as professional schools, to equip their students to meet the latter's professional obligations. I want to address that objection briefly in closing, but before doing so, it may be useful to restate my argument in summary form. The proper objects of legal education, in my view, are to enhance the capacity of students to think clearly, to feel intelligently, and to act knowingly. These are, of course, the traditional aims of liberal education, but they are not for that reason less appropriate as goals of legal education. The intellectual and moral qualities I have been considering are the proper ends of education because they are the qualities that men and women require to realize their human potential and to act as moral beings. But they are also the qualities lawyers require in the performance of their professional responsibilities. Courage, patience, sensibility, knowledge, breadth of perspective, clarity of thought and the other qualities I have mentioned are essential if lawyers are adequately to serve their clients and meet the obligations of public service they are so frequently called upon to undertake. Legal education, even if viewed solely as professional training, has no more important objective than assisting students to develop these qualities.

The proper objects of legal education, in my view, are to enhance the capacity of students to think clearly, to feel intelligently, and to act knowingly.



It is nevertheless worth asking, if only hypothetically, what the implications might be if there were some opposition between the qualities required of lawyers and those that we seek to foster as human qualities. It is not insignificant that a compelling illustration does not come to mind. To make the point, however, I shall assume, though I believe the truth is otherwise, that intellectual autonomy, including the capacity to hold views that are inconsistent with a client's interests, is incompatible with effective advocacy. On that assumption, should law schools refrain from the effort to assist students in developing intellectual autonomy? Or, would we wish, rather, to alter the way in which lawyers' obligations are defined? In fashioning even a professional education, to put the point directly, the qualities that we value because of their importance to (our understanding of) what it means to be human take precedence over the development of skills and knowledge that are of professional utility only.

The more difficult question is whether, as professional schools, law schools are obligated to foster development of purely professional skills and knowl-

edge in addition to pursuing the goals for which I have been arguing. The details of a law school program that would both advance those goals and meet the future professional needs of students are beyond my present purpose. Let us assume, however, that there are important professional skills and areas of knowledge that law schools would ignore if they were to confine themselves to pursuing the educational goals I suggest as their proper aim.

Law office management offers a convenient example. In using that example, I emphatically do not intend to trivialize the question. The negligent failure of lawyers to meet filing requirements is a common and serious problem. Acquainting students with techniques for ensuring that deadlines will not be overlooked would make an important contribution to the protection of legal rights. Similarly, acquainting students with efficient management techniques might permit recent law school graduates more readily to open their own offices and contribute to reducing the cost of legal services.

To dispel suspicion that I am stacking the deck, however, the techniques of trial advocacy may be taken as another illustration. Once again, I do not mean to suggest that the subject is unimportant. Knowledge of the means by which documents are introduced into evidence and skill in framing questions for direct and cross-examination are, plainly, essential to lawyers who appear in court. Chief Justice Burger is surely right in maintaining that lawyers who lack this equipment jeopardize their clients and contribute to the larger problems of the legal system.

Since lawyers must acquire such knowledge and skills somewhere—whether by apprenticeship or in a continuing legal education program or in law school—do not law schools, which are the only portal through which all lawyers must pass, have an obligation to provide them?

The answer, in my view, depends upon a judgment about the effect that the provision of such training is likely to have upon a law school's ability to puruse the fundamental goals of legal education. The time, energy, and attention of students and the financial resources of law schools are limited. A decision is required about the purposes to which they can most profitably be devoted. In my view, none is sufficient to justify allocating it to purely professional training. Doing so, unduly sacrifices the ability of the schools to cultivate the more general intellectual qualities that students require both to realize their human potential and as prospective lawyers.

It is, moreover, significant that purely professional training can as readily be offered outside law schools, but that many of the intellectual qualities discussed earlier are likely to take root and be cultivated only within a university. The nourishment of these qualities is the special mission of the university and, therefore, of law schools within the university. An unwillingness to dilute our efforts to carry out that mission does not signify indifference to societal needs, but a judgment about the ways in which the university can best serve those needs. Hannah Holborn Gray, President of the University of Chicago, captured my point precisely in a recent address. The pursuits of the university, she stated,

> . . . are in the first instance self-justifying, not instrumentally conceived. Its choices should aim at creating and protecting the conditions of . . . educational purpose that will sustain principles and objectives valuable in themselves. The University's special contribution to society will lie precisely in honoring its own mission and nourishing those activities that look beyond immediate or narrowly utilitarian ends, in acting in accordance with those processes which define and make effective the means to fulfilling the goals of a community of learning.

It is in the effort to define and fulfill the goals of a community of learning that law schools can recover a sense of purpose and a moral foundation for our common undertaking, the education of our students. ◘

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